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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

State Compensation Insurance Authority, State Compensation Insurance Fund, and Colorado Compensation Insurance Authority,
Petitioners,

vs.

Mark Simon, Cheryl Simon, and Malachai Simon,
Respondents.

On Petition for Writ of Certiorari to
The Supreme Court of the State of Colorado

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is a state worker's compensation insurance authority an arm of the state and, thus, not a person under 42 U.S.C. § 1983, if money judgments against it are paid by the state's risk management fund and claims against it are subject to the limitations and procedures of the state's Governmental Immunity Act?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, by the Attorney General of the State of Colorado, petition for a Writ of Certiorari to review the judgment of the Colorado Supreme Court in this case.

OPINIONS BELOW

The opinion of the Colorado Supreme Court (App. A) is reported at 946 P.2d 1298. The opinion of the Colorado Court of Appeals (App.C and D) is reported at 903 P.2d 1139.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on October 20, 1997. Petitioners in this Court (Respondents in the court below) timely filed a Petition for

Rehearing on November 3, 1997. In response to the Petition for Rehearing, the Colorado Supreme Court ordered that its opinion be modified, and, as modified, denied the Petition for Rehearing in an order entered November 10, 1997. App. G.

This Court has jurisdiction to review the judgment of the Colorado Supreme Court pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

The United States Constitution, Amendment 11; provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Section 1 of the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983, provides in relevant part:

> Every person who, under color of state statute, ordinance, regulation, custom, or usage, of any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

Section Colo. Rev. Stat. § 8-45-101(1) (1997), provides:

> There is hereby created the Colorado compensation insurance authority which shall be a body corporate and a political subdivision of the state. The authority shall not be an agency of state government, nor shall it be subject to administrative direction by any state agency except as provided in this article, and except for the purposes of the "Colorado Governmental Immunity Act," article 10 of title 24, C.R.S., and except for inclusion in the risk management fund and by the department of personnel as provided in part 15 of article 30 of title 24, C.R.S.

Other current Colorado statutes relating to the organization and operation of the Colorado compensation insurance authority are set forth at App. H-1-24. The current pertinent Colorado statutes on the Colorado Governmental Immunity Act are set forth in App. H-24-25, and on the Colorado Division of Risk Management are set forth at App. H-25-32.

STATEMENT OF THE CASE

Mark Simon and other members of his family filed a lawsuit in April 1993 in a Colorado state district court against the Colorado Compensation Insurance Authority and two of its predecessor entities (these state compensation insurance authorities or funds will be referred to collectively as "CCIA"). (The Simons' amended complaint is set forth at App. I). The Simons alleged that Mr. Simon had purchased workers' compensation insurance from CCIA prior to his injury in January 1985 in the course and scope of his employment, but that CCIA improperly denied Mr. Simon's workers' compensation claim and forced him to engage in lengthy litigation before an administrative body to enforce his claim. The Simons also alleged that Mr. Simon became involved in the legislative processes that related to

Colorado workers' compensation law and that CCIA allegedly released private and false information regarding Mr. Simon in an attempt to discredit him as part of this legislative effort.

The Simons alleged in their first claim for relief that CCIA wrongfully failed to pay benefits due under Mr. Simon's workers' compensation insurance policy and committed other wrongful acts, resulting in a deprivation of rights secured by federal law, including a violation of the 14th Amendment rights to equal protection and due process, entitling the Simons to a damages remedy under 42 U.S.C. § 1983 ("§ 1983"). The amended complaint also included six state law-tort claims.

CCIA, through the Colorado Attorney General, filed a motion to dismiss the amended complaint under Colo. R. Civ. P. 12(b)(1) and (5) for a lack of jurisdiction and a failure to state a claim upon which relief could be granted. On September 27, 1993, the Denver District Court granted the motion to dismiss. App. F. The District Court dismissed the claim under § 1983 because CCIA is not a "person" within the meaning of that statute. The District Court stated that CCIA is dependent entirely on the state for funds and resources to respond to a suit for damages, making it clearly an "arm of the state," citing *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). The district court also held that the six state law-tort claims were barred by the Colorado Governmental Immunity Act.

The decision of the District Court was affirmed by the Colorado Court of Appeals on December 15, 1994 in an original and a modified order. App. D and E. In addressing the issue of whether CCIA is a "person" under § 1983, the Court of Appeals stated that "CCIA is a hybrid entity." App. E-3. The court explained that CCIA is specifically designated as a political subdivision of the state,

with its board of directors appointed by the governor with the consent of the state senate, and is subject to an annual audit by the state auditor who reports to the governor and the general assembly. App. E-3. "Further, although the funds collected by CCIA consist of premiums, those funds are held in trust by the state treasurer who is responsible for investing the funds." App. E-3. The Court of Appeals concluded that even though "CCIA is not an agency of the state government for most purposes," it is critical that "it *is* a state agency in two important respects: for purposes of the Immunity Act and the risk management fund." *Id.* Because of this, "claims against the CCIA could have an impact on the state treasury." App. E-4.

The Court of Appeals also relied in part on the "instructive decision" of *Austin v. State Industrial Insurance System*, 939 F.2d 676 (9th Cir. 1991), where the Ninth Circuit Court of Appeals held that Nevada's state industrial insurance system was a "state agency" entitled to Eleventh Amendment immunity and, therefore, not a "person" for purposes of § 1983. App. E-6. The Colorado appellate court stated that "CCIA...shares many of the characteristics of Nevada's state insurance fund." App. E-6. For these reasons, the Colorado Court of Appeals rejected "plaintiffs' contention that the CCIA is a 'person' within the meaning of 42 U.S.C. § 1983." App. E-7. The Court of Appeals also affirmed the dismissal of the Simons' state law-tort claims.

The Simons petitioned for a Writ of Certiorari in the Colorado Supreme Court, which agreed to review the sole issue of whether CCIA is a "person" under § 1983. The Colorado Supreme Court **initially** affirmed the decision of the Court of Appeals by a four to three vote in an opinion dated January 13, 1997. App. B. Writing for the majority, Justice Kirshbaum wrote that "there is no bright line test for determining whether a state-created governmental entity is an

arm of the state," App. B-19, and reviewed the various factors used by this Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), and *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), and by the lower federal courts. App. B-18-34. Justice Kirshbaum stated that consideration of certain relevant factors "compels the conclusion that for purposes of Eleventh Amendment analysis the Authority must be deemed an arm of the state." App. B-45-46. In reaching this conclusion, Justice Kirshbaum emphasized the oversight exercised by the state over CCIA and decided that it is "arguable that a judgment in favor of Simon against the Authority on his § 1983 claim ultimately may be satisfied from sums derived from the state treasury." App. B-47.

On the factor of whether the judgment may be paid from the state treasury, Justice Kirshbaum cited this Court's decision in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994) for the proposition that when the factors affecting immunity point in different directions, courts should determine the issue of Eleventh Amendment immunity in light of the Amendment's underlying purposes which include due regard for a state's sovereign dignity and the prevention of federal court judgments that must be paid from the state treasury. App. B-47. Because the Colorado General Assembly established the CCIA as a state agency for purposes of the Colorado Governmental Immunity Act "to insulate the state treasury from claims such as those asserted by Simon," "as well as the oversight provisions included in the legislative scheme," the majority of the Colorado Supreme Court concluded in this initial opinion that CCIA is not subject to suit as a "person" for purposes of § 1983. App. B-47.

The Simons petitioned for rehearing and, on February 18, 1997, the Colorado Supreme Court granted the petition and withdrew the initial opinion dated January 13, 1997. App. C.

On October 20, 1997, the Colorado Supreme Court, by a five to two vote, reversed the Court of Appeals and held that CCIA is a "person" subject to suit under § 1983. App. A-2, 32. Writing for the majority, Justice Mullarkey stated that "we draw our analysis primarily from federal caselaw". App. A-16, and concluded that there were three "dominant factors" which must be applied:

> Our review of federal caselaw shows three dominant factors upon which federal courts consistently rely to determine whether a state-created entity is an arm of the state for purposes of Eleventh Amendment immunity in federal courts. These factors are: (1) how state law characterizes the entity, (2) whether the entity is autonomous and free from control of the state, and (3) whether the judgment against the entity would ultimately be paid by the state.

App. A-16.[1]

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[1]The Colorado Supreme Court recognized that although the Eleventh Amendment is inapplicable to claims brought under 42 U.S.C. § 1983 in state court, *Maine v. Thiboutot*, 448 U.S. 1, 9, n. 7 (1980), this Court made clear in *Will* and *Howlett v. Rose*, 496 U.S. 356 (1990), that the same Eleventh Amendment analysis used to determine whether an entity is an "arm of the state" entitled to immunity in federal court shall be utilized in determining whether an entity is a "person" for the purposes of an action brought under § 1983 in state court.

Although recognizing that some lower federal courts have held that this third factor, whether the judgment will be paid by the state, is the most critical factor, Justice Mullarkey rejected that approach because of the disagreements which she perceived in the opinions of the lower federal courts on the level of impact which this factor has. App. A-19. Justice Mullarkey also pointed out that while this Court stated in *Hess* that some federal appellate courts "recognized the vulnerability of the State's purse as the most salient factor," 513 U.S. at 404, this Court did not specifically adopt that position, and soon thereafter used "a multifactor analysis" in *Regents of the University of California v. Doe*, 117 S.Ct. 900 (1997). App. A-22-23.

In applying the first factor, Justice Mullarkey agreed with the Simons that CCIA is not an "arm of the state," primarily because Colo. Rev. Stat. § 8-45-101(1) (1997) establishes that CCIA is not an agency of state government, except for certain limited purposes. App. A-25. On the second factor, she opined that "CCIA is sufficiently autonomous from the state" to be considered a "person" under § 1983. App. A-25.

The court labeled the third factor as CCIA's "best argument," and stated that "we agree with the CCIA that a judgment in a § 1983 case might be paid out of the state treasury." App. A-29. The court also concluded, however, that another statute which provided that monies were to be paid out of the CCIA fund for losses sustained under policies

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App. A-10-11. *See* Schwartz and Kirklin, *In Section 1983 Litigation: Claims, Defenses and Fees* (2d Ed.), § 8.1, at p. 401 ("The limitations upon relief obtainable against the state in state court resulting from the definition of person and the same limitations upon relief obtainable against the state in federal court under the Eleventh Amendment.")

of insurance, could cause a judgment to be paid from the CCIA fund, rather than from the state's risk management fund. App. A-30-31. Because of this, the court concluded "that the third factor lends only limited support to the CCIA's position because the state treasury is not clearly put at risk to pay a § 1983 judgment against the CCIA." App. A-30.

The new majority declined to follow *Austin* and another case from a federal appellate court, *Lipofsky v. Steingut*, 86 F.3d 15 (2nd Cir. 1996), which also involved a § 1983 action against a state-created workers' compensation insurer. In *Lipofsky*, the Second Circuit Court of Appeals held that the New York State Insurance Fund was an "arm of the state" entitled to immunity under the Eleventh Amendment. *Lipofsky* was held to be distinguishable because the New York Finance Commissioner was authorized to transfer excess funds from the New York agency to other accounts within the state treasury and because the funds of the New York agency were "both controlled by the state and often co-mingled with other state funds." App. A-23. The Ninth Circuit decision in *Austin* was found to be distinguishable because the Nevada Supreme Court had previously found the Nevada agency to be a state agency, and because the Nevada statutes "consistently treat" the agency as an arm of the state or a state agency. App. A-23.

The Colorado Supreme Court, Chief Justice Vollack dissenting, using the majority's three-factor analysis to reach a different conclusion, wrote that "the first factor presented by the majority offers little guidance" because "the General Assembly has simultaneously characterized the CCIA in various ways, including as a political subdivision, state agency, and private insurance company." App. A-34. Chief Justice Vollack resolved the second factor in favor of CCIA, concluding that it "clearly does not function as an

autonomous entity despite its seemingly private form." App. A-37. He pointed out that CCIA operates through a board of directors, all of whom are appointed by the governor with the consent of the state senate, and that CCIA is subject to oversight by the state department of labor, the general assembly, state auditor, and state treasurer. App. A-35-37.

Chief Justice Vollack wrote that the third factor "of whether the state is obligated to pay a judgment rendered against the state entity is of critical importance to any Eleventh Amendment analysis." App. A-38. He relied in part for his conclusion on this Court's recent explanation in *Regents of the University of California*, where this Court wrote that "the question of whether a money judgment against a State instrumentality or official would be enforceable against the State is of considerable importance...." 117 S.Ct. at 904, as quoted at App. A-38. Chief Justice Vollack concluded that Colorado law clearly provided that any judgment of the type sought by the Simons against CCIA would be paid from the state's risk management fund. App. A-38. As for the statute relied upon by the majority to suggest there might be some ambiguity as to the source of funds to pay the judgment, Chief Justice Vollack wrote that the statute was clearly inapplicable as it only addressed the administration of the CCIA fund to cover claims made under insurance policies, not claims against CCIA itself for its own conduct. App. A-39-41.

Finally, Chief Justice Vollack criticized the majority for its refusal to follow the decisions of two federal circuit courts of appeals in *Austin* and *Lipofsky*:

> As the majority's opinion suggests, we must follow federal law in considering this issue. Despite the majority's attempts to distinguish these cases, both stand for the proposition that state insurance

> authorities are arms of the state that deserve Eleventh Amendment immunity. In my view, there is no reason to disregard this federal precedent.

App. A-42-43.

REASONS FOR GRANTING THE PETITION

I. THE COLORADO SUPREME COURT FAILED TO FOLLOW PRECEDENT ESTABLISHED IN THE FEDERAL COURTS AND THUS CREATED A SPLIT OF AUTHORITY OVER AN IMPORTANT QUESTION OF FEDERAL LAW.

The issue of whether a state-created entity is a "person" under § 1983 is one of federal law. *Howlett v. Rose*, 496 U.S. 356 (1990). As Chief Justice Vollack noted, the majority in the Colorado Supreme Court failed to follow the virtually identical federal cases of *Austin* and *Lipofsky*. In both of these cases, federal courts of appeals held that state-created workers' compensation insurance agencies which were very similar to CCIA were "arms of the state" with immunity under the Eleventh Amendment.

In *Austin*, the Ninth Circuit Court of Appeals carefully analyzed how the Nevada workers' compensation insurer was structured, focusing on factors such as the appointment of the agency's board of directors by the governor and the requirement that the board of directors report to the governor and the legislature on the operation of the agency. 939 F.2d at 678-9. The Ninth Circuit also considered the possible impact which a judgment against the Nevada agency would have on the state treasury. It pointed out that although the funds collected by the Nevada agency "consist of premiums

of policyholders and other private payments," those funds are held in trust by the state treasurer. 939 F.2d at 679. Therefore, a monetary judgment against the agency "could" impact the state treasury. *Id.* These factors were sufficient for the Ninth Circuit to conclude that the Nevada agency "is a state agency entitled to immunity under the Eleventh Amendment." *Id.*

Similarly, in *Lipofsky*, the Second Circuit Court of Appeals held that "although in certain respects SIF [the comparable New York workers' compensation insurance entity] functions similarly to a private insurer, we conclude that it is nonetheless a State agency entitled to Eleventh Amendment immunity." 86 F.3d at 16. While recognizing that the New York agency had a number of important characteristics which made it appear not to be an "arm of the state" (for example, the agency was largely self-sufficient based upon premium payments made by policyholders, it functioned similarly to a private insurance company, and it could sue and be sued in its own name), the Court of Appeals found these characteristics outweighed by others, such as the fact that the agency's governing body of commissioners was appointed by the governor, the state finance commissioner acts as the custodian of the agency's funds, and the management and operations of the agency "are circumscribed by statute." 86 F.3d at 16-17. Based on these factors, the Court of Appeals concluded that if Lipofsky were to prevail in his claim for damages, "the award would effectively be paid out of State funds." *Id.*

The attempt by the majority of the Colorado Supreme Court to distinguish *Austin* and *Lipofsky* rests upon factors which are far from sufficient to support the Colorado Supreme Court's change of position. *Austin* was said to be distinguishable because the Ninth Circuit Court of Appeals "emphasized the fact that a decision of the Nevada Supreme

Court had found the Nevada [agency] to be a state agency." App. A-23. However, while the Ninth Circuit stated that it was "informed" by the holding of the state court, 939 F.2d at 678, its decision certainly does not rest upon the decision of the Nevada Supreme Court to any substantial degree. The other supposed distinction in *Austin* is that the Nevada statutes are said to "consistently treat" the Nevada agency as an arm of the state or a state agency, while "the enabling statute creating the CCIA expressly provides that the CCIA is **not** a state agency." App. A-24. This conclusion ignores the many ways in which the Colorado agency is as much of a state agency as is the Nevada agency, such as being governed by a board appointed by the governor, being subjected to legislative oversight, and having its funds held by the state treasurer.

Lipofsky is supposedly distinguishable, according to the majority of the Colorado Supreme Court, partly because the New York Finance Commissioner is authorized to transfer excess monies from the state agency to other accounts within the state treasury and because the agency's funds were controlled by the state "and often commingled with other state funds." App. 23. But, the funds of any Colorado agency, including those of CCIA, are controlled by the state treasurer, who is to pay all disbursements from the fund and invest any surplus or reserves which are not needed for immediate use. Colo. Rev. Stat. § 8-45-118(a) and 8-45-120(1) (1997). The other distinction offered by the new majority for *Lipofsky* is the conclusion of the Second Circuit that the New York agency is a state agency for which the State is responsible while Colorado law provides that liability against CCIA is limited to the amount of the workers' compensation insurance fund. App. A-23. The new majority failed to explain, however, as Chief Justice Vollack did in his dissent, that the CCIA fund is limited to the payment of benefits to those entitled to receive them under

Colorado workers' compensation laws, Colo. Rev. Stat. § 8-45-102(1) (1997), while it is the separate risk management fund of the State, to which appropriations are made by the General Assembly, which is the sole source of funds to pay a judgment of the type sought by the Simons against CCIA. Colo. Rev. Stat. §§ 24-30-1502(5), and 24-30-1510(1)-(3) (1997).

The Colorado Supreme Court did not even attempt to distinguish *Austin* or *Lipofsky* on the important portions of their holdings that the judgments against the Nevada and New York agencies "could" impact the state treasury or "would in effect" impact the state treasury. *See Austin*, 939 F.2d at 679, and *Lipofsky*, 86 F.3d at 16-17. As cited above, Colorado statutes plainly provide that the State's risk management fund is the source of payments on judgments of the type sought by Simons in this case. Even the majority of the Colorado Supreme Court conceded that this was CCIA's "best argument" and that a judgment in this case "might be paid out of the state treasury." App. A-29. The Colorado Supreme Court also erred in ignoring the importance of this factor in *Austin* and *Lipofsky* and in minimizing this factor in its own analysis.

Therefore, this Court should grant this petition and review the decision of the Colorado Supreme Court which failed to follow federal precedent and caused a split of authority on this important question of federal law.

II. THIS COURT SHOULD ALSO GRANT THIS PETITION TO CLARIFY THE STANDARDS TO BE APPLIED IN DETERMINING WHEN AN AGENCY IS AN "ARM OF THE STATE" ENTITLED TO IMMUNITY OR A "PERSON" SUBJECT TO SUIT UNDER 42 U.S.C. § 1983.

In its 1989 decision in *Will*, an action brought under § 1983 in a Michigan **state** court against the Michigan Department of State Police and the director of the state police, this Court plainly stated that the definition of a "person" subject to suit under § 1983 not only does not include a state, but also does not include "governmental entities that are considered 'arms of the state' for Eleventh Amendment purposes." 491 U.S. at 70. But, *Will* contained little guidance for lower courts which face the task of determining whether a myriad of state-created entities are "arms of the state" for Eleventh Amendment purposes. The lower federal courts have often looked to two other decisions of this Court which preceded *Will*, *Mt. Healthy* (which was cited in *Will*), and *Lake Country Estates*. These cases, however, involved a local board of education and a bi-state agency and discussed some factors which were unique to those entities and not present in a more typical state-created entity such as CCIA.

The lack of guidance from this Court has led to the adoption of a variety of tests in the lower federal courts and in the state courts. As the Colorado Supreme Court majority opinion stated, "because the Court referred to different factors in *Mt. Healthy* and in *Lake Country Estates*, and because the Court did not specify the relative importance of any particular factor, lower federal courts have developed a diverse array of balancing tests." App. A-13. Each federal circuit court of appeals has developed its own test of when

an agency is an 'arm of the state' with its own list of factors. *See* Alex E. Rogers "Clothing State Governmental Entities With Sovereign Immunity: Disarray in the Eleventh Amendment Arm-Of-The-State Doctrine," 92 Columbia L. Rev. 1243, 1269-1271 (1992). The Colorado Supreme Court cited as examples of this "diverse array" the Fifth Circuit Court of Appeals which has identified six factors to be applied, and the Third Circuit Court of Appeals, which has articulated a three-prong test with numerous sub-factors. App. A-13-14.

The difficulty in applying these various tests has been compounded by different characterizations of the same factor within the same circuit court of appeals. For example, in *Watson v. University of Utah Medical Center*, 75 F.3d 569, 575 (10th Cir. 1996), the Tenth Circuit Court of Appeals stated that the governmental entity is immune "if the money judgment sought is to be satisfied out of the state treasury," but it cited *Haldeman v. State of Wyoming Farm and LoanBoard*, 32 F.3d 469, 473 (10th Cir. 1994), where it merely required that the monetary judgment "would possibly be paid from state funds." And, as the Colorado Supreme Court pointed out, the federal circuit courts of appeals have not been clear as to whether the state treasury factor is the most critical, or simply one of many. App. A-20.

The recent decisions of this Court have recognized some of the diversity of opinion on this issue, but have not contributed to a resolution of it. In *Hess*, for example, this Court carefully reviewed the structure of another bi-state agency, but also acknowledged that "Courts of Appeals have recognized the vulnerability of the state's purse as the most salient factor in Eleventh Amendment determinations." 513 U.S. at 404. This Court did not, however, resolve which factors must be considered, how the factors are defined, and what their order of importance is.

This Court's more recent opinion on this issue in *Regents of the University of California v. Doe* may have made it more difficult for the lower courts. The difficulty is evidenced by the new majority of the Colorado Supreme Court citing *Regents of the University of California* for its "multifactor analysis," App. A-21-22, while the dissenting chief justice cited the case for the proposition that the question of whether the State is obligated to pay a judgment rendered against the public entity is of critical importance. App. A-38.

The lack of guidance from this Court and the "diverse array" of tests used in the federal circuit courts of appeals now result in essentially ad hoc decisions such as that of the Colorado Supreme Court in the present case, which ignores clear precedent from other courts with nearly identical facts.

This case offers this Court an excellent opportunity to clarify the standards to be used to determine when an entity is a "person" under § 1983.

CONCLUSION

Petitioners respectfully request this Court to grant this petition for a writ of certiorari.

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DATED: February 4th, 1998

APPENDIX A

SUPREME COURT, STATE OF COLORADO

NO. 95SC304 October 20, 1997

MARK SIMON, CHERYL SIMON, AND MALACHAI SIMON, Petitioners,

v.

THE STATE COMPENSATION INSURANCE AUTHORITY, THE STATE COMPENSATION INSURANCE FUND, and THE COLORADO COMPENSATION INSURANCE AUTHORITY, Respondents.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT REVERSED AND CASE REMANDED WITH DIRECTIONS

JUSTICE MULLARKEY delivered the Opinion of the Court.
CHIEF JUSTICE VOLLACK dissents, and JUSTICE KOURLIS joins in the dissent.

The petitioners, Mark Simon (Simon), his wife, Cheryl Simon, and their son, Malachai Simon (collectively the Simons), challenge *Simon v. State Compensation Insurance*

Authority, 903 P.2d 1139 (Colo. App. 1994), where the court of appeals affirmed a judgment entered by the trial court dismissing state and federal claims asserted against respondents, the Colorado Compensation Insurance Authority (the CCIA), and its predecessors, the State Compensation Insurance Authority (the SCIA) and the State Compensation Insurance Fund (SCIF). We granted certiorari to review the court of appeals' determination that the Simons could not pursue a claim based on alleged violations of 42 U.S.C. § 1983 (1988) because the CCIA is not a person for purposes of that statute.[1] We reverse.

I.

This action stems from Mark Simon's attempts to obtain workers' compensation benefits from the CCIA. In addition to other federal and state claims, the Simons alleged that the CCIA violated 42 U.S.C. § 1983 (1988) by wrongfully withholding benefits. For the purposes of our review, because the district court dismissed the action for failure to state a claim pursuant to C.R.C.P. 12(b), we take the allegations as stated in the Simons' complaint as true. See *Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 122-23

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[1] Although the court of appeals affirmed the district court's dismissal of numerous state and federal claims, our review in this case is limited solely to the propriety of the court of appeals' determination of § 1983 liability. The issue for which we granted certiorari was:

> Whether the court of appeals erred in holding that the Colorado Compensation Insurance Authority (CCIA), is "an arm of the state" and thus not a "person" within the meaning of 42 U.S.C. § 1983 (1988), thereby precluding the petitioners' claim on that basis.

(Colo. 1992); *Destefano v. Grabrian*, 763 P.2d 275, 278 (Colo. 1988).

According to the Simons' complaint, Mark Simon and his business partners obtained a workers' compensation insurance policy with the SCIF in 1982. In 1984, Simon became a sole proprietor. At that time, Simon notified the SCIF that he was the insured and continued to pay his insurance premiums from that date through January 1985.

On or about January 15, 1985, Simon sustained a pelvic injury during the course of his employment and filed a claim with the SCIF. At that time, the SCIF denied Simon's claim on the grounds that, as a sole proprietor, he was not covered under the terms of the policy. Simon successfully challenged the SCIF's decision before an administrative law judge (ALJ) and the Industrial Claims Appeals Panel (the Panel) affirmed. Both the ALJ and the Panel found that Simon's injuries were covered by the terms of the policy that was issued to Simon.

On July 1, 1987, the SCIF's responsibility for payments of claims pursuant to Simon's policy was assumed by the newly created SCIA. *See* §§ 8-54-102, -102.5, 3B C.R.S. (1986). Although it had been determined that Simon's injury was covered by the policy, the SCIA disputed Simon's entitlement to temporary disability benefits or medical benefits. Simon sought administrative relief from the SCIA's determination, and an ALJ concluded that Simon was entitled to benefits. On appeal, the ALJ's ruling was affirmed by the Panel.

The SCIA subsequently filed a general admission of liability regarding Simon's temporary and total disability but maintained that it was entitled to an offset because Simon had settled with a third party. Simon objected and filed a motion to reopen the proceeding to address the offset issue.

Again, the ALJ issued an order in Simon's favor which was later affirmed by the Panel.

On July 1, 1989, the SCIA's responsibilities were assumed by the newly created CCIA. *See* § 8-45-101, 3B C.R.S. (1990). The CCIA failed to make any disability payments to Simon until September of 1992. In addition, during this period of time Simon became involved in the legislative process relating to workers' compensation laws in Colorado. According to Simon, as a result of his involvement in the legislative process, the CCIA released confidential and/or false information about him in an effort to discredit him.

The Simons filed the present action on April 13, 1993. The Simons' complaint contained state law claims of bad faith and breach of fiduciary duty, outrageous conduct, loss of consortium, interference with familial relations, and invasion of privacy. The complaint also alleged that the CCIA had violated state and federal law with respect to the publication of "false, confidential and/or private statements." Finally, the complaint alleged that the CCIA was liable for violations of 42 U.S.C. § 1983 (1988). According to the Simons, the CCIA's conduct violated their equal protection and due process rights guaranteed by the Fourteenth Amendment to the United States Constitution.

The CCIA filed a motion to dismiss the Simons' complaint on the grounds that the state law claims were barred by the Colorado Governmental Immunity Act (Immunity Act), sections 24-10-101 to -120, 10A C.R.S. (1988), and that the § 1983 claim was inapplicable because

the CCIA was not a person for the purposes of that statute.[2] The district court agreed with the CCIA and dismissed the action.

On appeal, the court of appeals affirmed the district court's judgment. First, the court of appeals held that the state law claims were properly dismissed pursuant to the Immunity Act. The court of appeals also held, relying on *Austin v. State Industrial Insurance System*, 939 F.2d 676 (9th Cir. 1991), and *Wigger v. McKee*, 809 P.2d 999 (Colo. App. 1990), that the CCIA was an arm of the state and not a person for the purposes of § 1983 liability. According to the court of appeals, whether a government entity is an "arm of the state" is determined "by balancing the entity's independent powers with those entirely dependent on the state." *Simon*, 903 P.2d at 1145. As previously noted, we granted certiorari solely to review the court of appeals' conclusion as to the CCIA's status under 42 U.S.C. § 1983 (1988).

II.

The State Compensation Insurance Fund (SCIF) was established by the General Assembly in 1915. The SCIF was developed to allow employers to secure compensation for injured employees or the dependents of injured employees by paying a premium into the SCIF. *See* ch. 179, sec. 20, 1915 Colo. Sess. Laws 515, 529. At the time of Simon's injury, the SCIF was a division of the State Department of Labor and Employment. *See* § 8-54-101(1), 3 C.R.S. (1973). The SCIF administered itself under the

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[2] As discussed in this opinion, in order for a defendant to be liable for a violation of 42 U.S.C. § 1983 (1988), the plaintiff must first establish that the defendant is a "person." *See Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

direction of a manager who was appointed by the director of the State Department of Labor and Employment. *See* §§ 8-54-102, -104(1), 3 C.R.S. (1973). The General Assembly also created an advisory council to assist the manager which consisted of the commissioner of insurance and twelve other members who were appointed by the governor. *See* § 8-54-103(1), 3 C.R.S. (1973). Of the twelve appointees, two were members of the General Assembly, eight were employers insured with the SCIF, and two were employees whose employers were insured with the SCIF. *See id.*

On July 1, 1987, the monies from the SCIF were transferred to the newly created SCIA Fund. *See* § 8-54-102(1), 3B C.R.S. (1986). The duties for administering SCIA Fund were transferred to the SCIA on January 1, 1987. *See* § 8-54-102.5(1), 3B C.R.S. (1986). Unlike the SCIF, the powers of the SCIA were vested in a board of five directors appointed by the governor with the consent of the senate. *See* § 8-54-102.5(2), 3B C.R.S. (1986). The board consisted of the executive director of the Department of Labor and Employment, three employers insured with the SCIA, and one other member who was either an employee whose employer was insured with the SCIA or a concerned citizen. *See id.* The board had the power to appoint a manager of the SCIF Fund, develop and approve an annual budget, establish general policies and procedures for the administration of the SCIF Fund, promulgate regulations, review and recommend legislation pertaining to workers' compensation, and fix the rates to be charged for compensation insurance. *See* §§ 8-54-102.5(5), -105, 3B C.R.S. (1986).

In 1990, the legislature created the Colorado Compensation Insurance Authority (CCIA) and Fund. Similar to the SCIA, the CCIA is administered by a board of directors appointed by the governor. *See* § 8-45-101(2)(a),

3B C.R.S. (1996 Supp.). However, the CCIA board consists of seven members, and the statute does not require the executive director of the Department of Labor and Employment to be a member. *See id.* Instead, that board position now must be filled by a person "experienced in the management and operation of insurance companies." *Id.*

The monies in the respective Funds of the CCIA and its predecessors have been used to pay "losses sustained or liabilities incurred under the contracts or policies of insurance" issued to employers. *See* ch. 179, sec. 22, 1915 Colo. Sess. Laws 515, 529-30; § 8-54-102(4), 3B C.R.S. (1986); § 8-45-102(4), 3B C.R.S. (1996 Supp.). Each entity has been required to fix the lowest possible rate consistent with a solvent fund and the creation and maintenance of a reasonable surplus. *See* ch. 179, sec. 28, 1915 Colo. Sess. Laws 515, 533; § 8-54-109, 3B C.R.S. (1986); § 8-45-106, 3B C.R.S. (1996 Supp.). In addition, the state treasurer has been the custodian of each Fund. *See* ch. 179, sec. 66, 1915 Colo. Sess. laws 515, 552; § 8-54-221, 3B C.R.S. (1986); § 8-45-118, 3B C.R.S. (1996 Supp.). However, with respect to the SCIA Fund and the CCIA Fund, the General Assembly included a provision that monies of the Fund were not to be transferred or revert to the state general fund at the end of the fiscal year. *See* § 8-54-102(5), 3B C.R.S. (1986); § 8-45-102(5), 3B C.R.S. (1996 Supp.). The General Assembly also has consistently provided that the state shall not be liable for payments chargeable to the Funds beyond the amount in the Funds. *See* ch. 179, sec. 20, 1915 Colo. Sess. Laws 515, 529; § 8-54-102(1), 3B C.R.S. (1986); § 8-45-102(1), 3B C.R.S. (1996 Supp.)

The SCIA and CCIA differ from the original SCIF in two important respects. First, unlike the SCIF employees, the CCIA and SCIA employees are exempted from the state personnel system. *See* § 8-54-102.5(9), 3B C.R.S. (1986);

§ 8-45-101(9), (10), 3B C.R.S. (1996 Supp.). Second, the enabling statutes for both the SCIA and CCIA categorized those entities as corporate bodies and political subdivisions of the state and expressly provided that the entities were not state agencies. *See* § 8-54-102.5(1), 3B C.R.S. (1986); § 8-45-101(1), 3B C.R.S. (1996 Supp.).

Having reviewed the history of the CCIA and the Fund that it administers, we now turn to the question whether the CCIA is a "person" under § 1983.

III.

Section 1 of the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983 (1988), provides in relevant part:

> Every person who, under color of state statute, ordinance, regulation, custom, or usage, of any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

(Emphasis added.) As noted above, the court of appeals in this case affirmed the district court's dismissal of the Simons' § 1983 claims because it concluded that the CCIA was an "arm of the state" and not a "person" under 42 U.S.C. § 1983 (1988). Before addressing the merits of the court of appeals' conclusion, we will first identify the proper framework for § 1983 analysis.

The leading United States Supreme Court case examining the delicate question of whether a state-created entity is a "person" under § 1983 is *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). Prior to *Will*, the bulk of the Supreme Court's discussion of this issue was limited to the status of local government boards and/or municipalities. For example, in *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), the Supreme Court overruled long-standing precedent and held that local governing bodies such as municipalities were persons under § 1983. *See Monell*, 436 U.S. at 701. Subsequently, in *Quern v. Jordon*, 440 U.S. 332 (1979), the Supreme Court briefly touched on the broader issue of the status of state-created entities in § 1983 cases when it stated that Congress did not intend to abrogate state Eleventh Amendment immunity in § 1983 suits. *See Quern*, 440 U.S. at 341-45. However, because the action in *Quern* was filed in federal court, the Supreme Court's discussion was limited to the applicability of Eleventh Amendment immunity and did not specifically address whether a state was a "person" under § 1983.[3]

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[3] In *Uberoi v. University of Colorado*, 713 P.2d 894 (Colo. 1986), a pre-*Will* decision, we held that the University of Colorado was a "person" under § 1983. In its *Will* decision, the Supreme Court stated that it granted certiorari to resolve a conflict among the courts on the question of whether a state is a person under § 1983 and cited *Uberoi* as one of the cases holding that the state is a person. *See Will*, 491 U.S. at 61 n.3. *Will* mischaracterized the holding in *Uberoi* because *Uberoi* addressed only the § 1983 status of the university, not the § 1983 status of the state. We leave it for another day to decide whether *Will* overruled *Uberoi*'s holding that the University of Colorado was a person for the purposes of § 1983. We also held in *Uberoi* that the Eleventh Amendment was inapplicable to § 1983 claims in state court. While this is technically correct, *see Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980), subsequent Supreme Court

Unlike *Quern*, the plaintiff in *Will* filed his § 1983 action in state court. Because Eleventh Amendment immunity does not apply in state courts, the question of whether a state was a person under § 1983 was squarely before the Supreme Court for the first time. *See Will*, 491 U.S. at 63-64. Based in large part on the fact that the Eleventh Amendment provides states with immunity in federal court, the Court held that a state is not a "person" under 42 U.S.C. § 1983. *See id.* at 66. The Court also concluded that, as "arms of the State," the Michigan Department of State Police and its director likewise could not be sued in state court under § 1983. *See id.* at 70-71.

The Eleventh Amendment provides in relevant part that:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by Citizens or Subjects of any Foreign State.

While the terms of the Eleventh Amendment only establish a limitation on the jurisdiction of federal courts, the Supreme Court reasoned that it would be inconsistent to treat a state-created entity as an "arm of the State" for the purposes of Eleventh Amendment immunity in federal court proceedings while treating the same entity as a "person" for the purposes of § 1983 claims in state court proceedings. Thus, under *Will*, an Eleventh Amendment arm-of-the-state analysis must be applied to determine whether a state-created

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opinions discussed *infra* at 13-14 have established that an Eleventh Amendment arm-of-the-state analysis must be employed in a state court case when determining whether a state-created entity is a "person" under § 1983.

entity is a "person" under § 1983.[4] Therefore, in order to determine whether the CCIA and its predecessors are "persons" that can be sued under 42 U.S.C. § 1983 (1988), we must decide whether the CCIA is an arm of the state under Eleventh Amendment analysis.[5]

Because the *Will* decision did not fully explain the proper scope of the arm-of-the-state analysis, lower federal

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[4] One year after *Will* was decided, in *Howlett v. Rose*, 496 U.S. 356 (1990), the Supreme Court reasserted the appropriateness of Eleventh Amendment analysis when determining whether an entity is a "person" under section 1983. The court stated:

> As we held last term in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), an entity with Eleventh Amendment immunity is not a "person" within the meaning of § 1983. . . . *Will* establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal court or state court.

Howlett, 496 U.S. at 365.

[5] Many other state courts have reached the same conclusion that an Eleventh Amendment arm-of-the-state analysis must be utilized when determining whether a state-created entity is a person under § 1983. *See, e.g., Town of Lake Clarke Shores v. Page*, 569 So.2d 1256, 1257 (Fla. 1990); *Board of Trustees v. Landry*, 638 N.E.2d 1261, 1264 (Ind. Ct. App. 1994); *Livingood v. Meece*, 477 N.W.2d 183, 190-91 n.5 (N.D. 1991); *Williams v. State*, 589 A.2d 840, 844 (Vt. 1990). *But see Daddow v. Carlsbad Mun. Sch. Dist.*, 898 P.2d 1235, 1239 (N.M. 1995) (suggesting that § 1983 analysis is different from Eleventh Amendment arm-of-the-state analysis), *cert. denied*, 116 S. Ct. 753 (1996).

and state courts have relied on numerous factors articulated in two earlier Supreme Court decisions to determine whether a particular state-created entity is an arm of the state. The first of these two cases, *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), concerned the status of a local school board. In concluding that a local school board was not an arm of the state under the Eleventh Amendment, the Supreme Court considered: (1) how local school districts were characterized under state law; (2) whether the school board was subject to the guidance of the state; (3) whether the school board received significant funding from the state; and (4) whether the school board had the power to raise its own funds. *See id.* at 280. Without placing particular emphasis on any one of these factors, the Supreme Court held that "[o]n balance," the local school board was "more like a county or city than it [was] like an arm of the State." *Id.*

The second major Supreme Court case addressing the factors to be considered in the arm-of-the-state analysis was *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). In *Lake Country Estates* the Supreme Court considered the Eleventh Amendment immunity status of the Tahoe Regional Planning Agency (Tahoe Agency). The Tahoe Agency was created by an interstate compact between California and Nevada to coordinate and regulate land development in the Lake Tahoe area. *See* 440 U.S. at 394. In reaching its conclusion that the Tahoe Agency was not an arm of the state, the Court relied on the following factors: (1) that the Tahoe agency was designated in the interstate compact as a "separate legal entity" and a political subdivision; (2) that the majority of the Tahoe Agency governing members were appointed by counties and not by the states; (3) that the agency was exclusively funded by the counties; (4) that the compact expressly stated that the Tahoe Agency's obligations were

not binding on the states; (5) that the regulation of land use was of local, rather than state-wide, concern; and (6) that the states did not have veto power over rules and regulations promulgated by the agency. *See id.* at 401-02. As in *Mt. Healthy*, the Supreme Court did not identify any one factor as dispositive.

These two Supreme Court decisions clearly indicate that the question of whether a particular entity is an arm of the state is to be determined by balancing various factors. However, because the Court referred to different factors in *Mt. Healthy* and in *Lake Country Estates*, and because the Court did not specify the relative importance of any particular factor, lower federal courts have developed a diverse array of balancing tests.[6] For example, the Fifth Circuit Court of Appeals has identified six factors:

> (1) whether the state statutes and case law characterize the agency as an arm of the state; (2) the source of the funds for the agency; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; (6) whether the entity has the right to hold and use property.

Delahoussaye v. New Iberia, 937 F.2d 144, 147 (5th Cir. 1991). In contrast, the Third Circuit Court of Appeals has articulated a three-prong test with numerous sub-factors:

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[6] For a survey of the tests adopted by various lower federal courts, *see* Alex E. Rogers, Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 Colum. L. Rev. 1243, 1269-71 (1992).

> (1) whether, in the event the plaintiff prevails, the payment of the judgment would come from the state (this includes three considerations: whether payment will come from the state treasury, whether the agency has the money to satisfy the judgment, and whether the sovereign has immunized itself from responsibility for the agency's debts);
>
> (2) the status of the agency under state law (this includes four factors: how state law treats the agency generally, whether the entity is separately incorporated, whether the agency can sue and be sued in its own right, and whether it is immune from state taxation); and
>
> (3) what degree of autonomy the agency has.

Peters v. Delaware River Port Auth., 16 F.3d 1346, 1350 (3d Cir. 1994).

The Tenth Circuit Court of Appeals has applied different factors in different cases. Recently, in *Watson v. University of Utah Medical Center*, 75 F.3d 569, 574-75 (10th Cir. 1996), the Tenth Circuit examined the University of Utah Medical Center's degree of autonomy, the extent of financing it received independent of the state treasury, and its ability to provide for its own financing before concluding that it was an arm of the state under the Eleventh Amendment. However, in two earlier cases, *Mascheroni v. Board of Regents of the University of California*, 28 F.3d 1554 (10th Cir. 1994) and *Ambus v. Granite Board of Education*, 995 F.2d 992 (10th Cir. 1993), the Tenth Circuit specifically relied on all four Mt. Healthy factors. *See Mascheroni*, 28 F.3d at 1559; *Ambus*, 995 F.2d at 994.

Our court of appeals addressed the post-*Will* arm-of-the-state analysis in *Wigger v. McKee*, 809 P.2d 999 (Colo. App. 1991).[7] In *Wigger*, the plaintiff brought a § 1983 action against a county, a county board of commissioners, a county sheriff's department, a county department of social services, and experts in their official and individual capacities, based on an alleged wrongful prosecution of the plaintiff for sexually assaulting young girls. *See Wigger*, 809 P.2d at 1001. The *Wigger* court concluded that the county, the board of commissioners, and the sheriff's department were all "persons" under § 1983 while the state and county departments of social services were arms of the state. *See id.* at 1003-04. In reaching its conclusion, the court of appeals balanced each entity's independent powers with those entirely dependent on the state. *See id.* at 1003. According to the court of appeals, "[i]f the entity is the state's alter ego, dependent entirely on the state for the funds and resources to respond to a suit for damages, it is equivalent to the state." *Id.*

In the present case, the court of appeals heavily relied on the reasoning of *Wigger* in concluding that the CCIA is an arm of the state. However, as we noted in *City of*

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[7] *Wigger* is one of a number of court of appeals' decisions which have considered whether a state-created entity is a "person" under § 1983. *see Bannister v. Colorado Supreme Court Disciplinary Counsel*, 856 P.2d 79, 81 (Colo. App. 1993) (Disciplinary counsel is not a "person" under § 1983); *National Camera, Inc. v. Sanchez*, 832 P.2d 960, 963-64 (Colo. App. 1991) (State Board for Community Colleges and Occupational Education is not a "person" under § 1983); *Stjernholm v. Colorado State Bd. of Chiropractic Exam'rs*, 820 P.2d 1166, 1167 (Colo. App. 1991) (Board of Chiropractic Examiners is not a "person" under § 1983); *Weaver v. Colorado Dep't of Soc. Servs.*, 791 P.2d 1230, 1235 (Colo. App. 1990) (Department of Social Services is not a "person" under § 1983).

Lakewood v. Brace, 919 P.2d 231 (Colo. 1996), the defenses to § 1983 actions are defined by federal law and we need not consider here whether *Wigger* was properly decided. *See Brace*, 919 P.2d at 238; *see also Howlett v. Rose*, 496 U.S. 356, 375-76 (1990) (stating that "[t]he elements of, and defenses to, a federal cause of action are defined by federal law."). Therefore, we draw our analysis primarily from federal caselaw.

IV.

Our review of federal caselaw shows three dominant factors upon which federal courts consistently rely to determine whether a state-created entity is an arm of the state for the purposes of Eleventh Amendment immunity in federal courts. These factors are: (1) how state law characterizes the entity, (2) whether the entity is autonomous and free from the control of the state, and (3) whether the judgment against the entity would ultimately be paid by the state. Guided by the federal caselaw and the Supreme Court's reasoning in *Will*, we now find that these same factors are appropriate when determining whether a state-created entity is a "person" that can be sued under 42 U.S.C. § 1983 (1988). Moreover, consistent with Mt. Healthy and Lake Country Estates, we hold that these factors are part of a balancing test and that it is therefore necessary to consider all three factors before reaching a conclusion as to the entity's immunity status. We address each of these factors in turn.

A.

While the ultimate determination of whether an entity is an arm of the state under the Eleventh Amendment is a question of federal law, *see Howlett*, 496 U.S. at 375-76; *Brace*, 919 P.2d at 238, the first factor to be considered in

making that determination is how the entity is characterized by state law. Although some lower federal courts have concluded that this factor is often decisive or controlling,[8] the Supreme Court has simply indicated that it is one of the factors that should be considered as part of an arm-of-the-state analysis. *See Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. at 44-45; *Lake Country Estates*, 440 U.S. at 401-02; *Mt. Healthy*, 429 U.S. at 280. Legislative declarations of purpose and judicial decisions regarding the entity's characteristics and powers are relevant to this inquiry.

When assessing the nature of an entity under state law, courts often look first to the statutory language creating the entity. For example, in *Mt. Healthy* the Supreme Court relied on the fact that Ohio state law designated local school boards as political subdivisions in reaching its conclusion that the Mt. Healthy school board was not an arm of the state. *See Mt. Healthy*, 429 U.S. at 280. Similarly, in *Lake Country Estates* the Court was persuaded by the fact that the interstate compact creating the Tahoe Agency designated the agency as a "separate legal entity" and a political subdivision. *See Lake Country Estates*, 440 U.S. at 401. In both cases, the Supreme Court essentially concluded that the entities were not arms of the state because the enabling statutes failed to articulate a clear intention to cloak the entities with Eleventh Amendment immunity.

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[8] *See Huber, Hunt & Nichols, Inc. v. Architectural Stone Co., Inc.*, 625 F.2d 22, 25 (5th Cir. 1980) (state law "subsumes" all other factors); *Korgich v. Regents of the New Mexico Sch. of Mines*, 582 F.2d 549, 551 (10th Cir. 1978) (state law is "decisive").

B.

The second factor to be considered when determining whether an entity is an arm of the state is the level of autonomy and independence the entity enjoys from the control of the state. The greater the state administrative and financial influence on the entity, the more likely it is that the entity will be treated as an arm of the state. For example, in *Lake Country Estates* the Supreme Court noted that the majority of the Tahoe Agency's board members were appointed by local counties and cities collectively and not by the two states. *See Lake Country Estates*, 440 U.S. at 402. Some lower federal courts have also considered other indications of state administrative control such as: (1) the authority of the state to veto regulations promulgated by the entity, *see Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.*, 948 F.2d 1084, 1087-88 (8th Cir. 1991); (2) whether the entity must seek state approval with respect to entity policies or activities, *see Ambus*, 995 F.2d at 995-96; and (3) whether the entity must file reports to the state or submit to audits, *see Christy v. Pennsylvania Turnpike Comm'n*, 54 F.3d 1140, 1149 (3d Cir. 1995).

Another important measure of entity autonomy is whether the state exerts any financial influence over the entity. The degree to which an entity receives all or most of its funding from the state was listed as a factor in both *Mt. Healthy* and *Lake Country Estates*. In *Mt. Healthy*, the fact that local school boards had the ability to generate their own funds through the issuance of bonds or levying taxes was significant to the Court's conclusion that the boards were more like a county or city than an arm of the state. *See Mt. Healthy*, 429 U.S. at 280. Similarly, in *Lake Country Estates* the Supreme Court was partly persuaded by the fact that the Tahoe Agency was funded exclusively by counties

in reaching its conclusion that the agency was not an arm of the state. *See Lake Country Estates*, 440 U.S. at 401-02.

C.

The third factor to be considered as part of an arm-of-the-state analysis is whether the judgment will ultimately be paid by the state. Support for consideration of this factor originated in two cases that did not involve arm-of-the-state inquiries. In *Edelman v. Jordan*, 415 U.S. 651 (1974), and *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945), the Supreme Court determined that in actions for retrospective relief against state officials the state is the real party in interest and may invoke its Eleventh Amendment immunity because the state will ultimately pay any judgment entered against the official. *See Edelman*, 415 U.S. at 663; *Ford Motor Co.*, 323 U.S. at 464.

In *Mt. Healthy*, the Supreme Court applied a similar rationale when it considered whether the entity received significant funding from the state or had the power to raise its own revenue as a factor in determining whether the entity was an arm of the state. *See Mt. Healthy*, 429 U.S. at 280. In *Lake Country Estates*, the Court took this factor one step further when it considered whether the obligations of the entity at issue were binding on the states involved. *See Lake Country Estates*, 440 U.S. at 402.

While lower federal courts have consistently applied this factor when making arm-of-the-state determinations, the opinions do not agree as to the level of impact that must be shown for this factor to attain significance. *See Watson v. University of Utah Med. Ctr.*, 75 F.3d 569, 575-76 (10th Cir. 1996) (judgment "might be satisfied, at least indirectly" from state treasury); *Austin v. State Indus. Ins. Sys.*, 939 F.2d 676, 679 (9th Cir. 1991) (judgment "could" impact

state treasury); *Travelers Indem. Co. v. School Bd.*, 666 F.2d 505, 509 (11th Cir. 1982) (judgment "must under all circumstances" be satisfied out of state treasury). Nevertheless, these cases support our conclusion that whether a judgment will impact the state treasury is an important consideration in an arm-of-the-state analysis.

The CCIA argues that the state treasury criterion is the most important factor and should be held dispositive in this case.[9] We disagree.

Supreme Court precedent leads us to conclude that the judgment liability factor alone does not resolve whether an entity is entitled to Eleventh Amendment immunity. While the Supreme Court has acknowledged that the state treasury criterion is an important factor that should be considered, it has not indicated that, standing alone, it outweighs all other factors. For example, in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994), the Supreme Court

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[9] The CCIA correctly points out that some federal courts have suggested that the state treasury criterion is the most important factor. *See Watson v. University of Utah Med. Ctr.*, 75 F.3d 569 (10th Cir. 1996) (holding that "the governmental entity is immune from suit if the money judgment sought is to be satisfied out of the state treasury."); *Hutsell v. Sayre*, 5 F.3d 996, 999 (6th Cir. 1993) ("The most important factor . . . is whether any monetary judgment would be paid out of the state treasury."), *cert. denied*, 510 U.S. 1119 (1994); *Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d 807, 818 (3d Cir. 1991) ("[T]he 'most important' factor is 'whether any judgment would be paid from the state treasury.'") (quoting *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3rd Cir. 1989)). However, as discussed earlier, other lower federal courts have suggested that different factors are equally, if not more, important. *See Huber*, 625 F.2d at 25 (state law "subsumes" all other factors); *Korgich*, 582 F.2d at 551 (state law is "decisive").

considered factors other than state funding before concluding that the Port Authority Trans-Hudson Corporation was not an arm of the state. *Hess*, 513 U.S. at 45-49. Contrary to the CCIA's argument here, the Court's pronouncement in *Hess*, regarding the importance of the state treasury criterion, was limited to an acknowledgment that some lower federal appellate courts have "recognized the vulnerability of the State's purse as the most salient factor." *id.* In a subsequent case, *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), the Supreme Court expressly stated, "The Eleventh Amendment does not exist solely in order to 'preven[t] federal court judgments that must be paid out of a State's treasury' . . . ." *Seminole*, 116 S. Ct. at 1124 (quoting *Hess*, 513 U.S. at 48).

Even more recently, in Regents of the *University of California v. Doe*, 117 S. Ct. 900 (1997), the Supreme Court referred to a multifactor analysis when it addressed the Eleventh Amendment status of a state university in a contract action. In its general discussion of the arm-of-the-state analysis, the *Doe* Court stated that it sometimes considered "the essential nature and effect of the proceeding" and "the nature of the entity created by state law" when determining whether an entity should be granted Eleventh Amendment immunity. *Id.* The *Doe* Court also stated that "the question whether a money judgment against a state instrumentality or official would be enforceable against the state is of considerable importance to any evaluation of the relationship between the State and the entity . . . being sued." *Id.* at 904. However, the only issue in dispute in *Doe* was whether the state university was divested of Eleventh Amendment immunity for a breach of contract action when the federal government had agreed to indemnify it against litigation costs. *See Doe*, 117 S. Ct. at 901. As to this narrow issue, the *Doe* Court held that "it is the entity's legal liability, rather than its ability or inability to require a third party to

reimburse it, . . . that is relevant." *Id.* at 904. Thus, the *Doe* Court did not address whether the state treasury criterion was the dispositive or most important factor in an arm-of-the-state analysis.

In both *Hess* and *Doe*, the Supreme Court had an opportunity to reject the balancing tests articulated in *Lake Country Estates* and *Mt. Healthy* and instruct us that the funding factor alone was dispositive. Because the Supreme Court did not take that step, the balancing test remains in effect. We therefore reject the CCIA's argument and hold that the mere fact that the judgment would or could be paid by the state does not require the conclusion that the CCIA is an arm of the state. All three factors must be considered and weighed before reaching a conclusion as to the status of the CCIA.

V.

As an alternative argument, the CCIA contends that the application of the balancing test requires us to reach the same conclusion that was reached in *Austin v. State Industrial Insurance System*, 939 F.2d 676 (9th Cir. 1991), and *Lipofsky v. Steingut*, 86 F.3d 15 (2d Cir. 1996). Both cases involved workers' compensation insurance and in both cases the courts found the entity in question to be an arm of the state. In *Austin*, the Ninth Circuit Court of Appeals held that the Nevada State Industrial Insurance System (Nevada SIIS) was entitled to Eleventh Amendment immunity. More recently, the Second Circuit Court of Appeals held in *Lipofsky* that the New York State Insurance Fund (New York SIF) was an arm of the state under the Eleventh Amendment.

Like the CCIA, both the Nevada SIIS and the New York SIF are state-created entities that provide workers' compensation insurance. Also, in reaching their respective

conclusions that these entities were arms of the state, both the *Austin* court and the *Lipofsky* court applied multifactor balancing tests similar to the one we apply here. However, important differences exist between the CCIA and those entities, both in how the entities are structured and how they are treated under state law. For example, in *Austin* the court emphasized the fact that a decision of the Nevada Supreme Court had found the Nevada SIIS to be a state agency. *See Austin*, 939 F.2d at 678. In addition, the Nevada Revised Statutes consistently treat the Nevada SIIS as an arm of the state or a state agency. *See id.* No comparable declaration of state law exists here. In fact, the enabling statute creating the CCIA expressly provides that the CCIA is not a state agency.

The entity in *Lipofsky* is also different from the CCIA. First, unlike the CCIA Fund, the New York Finance Commissioner is authorized to transfer excess New York SIF monies to other accounts within the state treasury. In reaching its conclusion that the New York SIF was an arm of the state, the *Lipofsky* court was partly persuaded by the fact that SIF funds were both controlled by the state and often commingled with other state funds. In addition, under New York law the state has an ultimate responsibility to satisfy any liability against the New York SIF. *See Lipofsky*, 86 F.3d at 17. "SIF is 'a State agency for all of whose liabilities the state is responsible.'" *Id.* (quoting *Methodist Hosp. of Brooklyn v. State Ins. Fund*, 476 N.E.2d 304, 308 (N.Y. 1985)). In contrast, Colorado law specifically provides that liability against the CCIA is limited to the amount of the Fund. *See* § 8-45-102(1), 3B C.R.S. (1996 Supp.).

Because the entities at issue in *Lipofsky* and *Austin* are distinguishable from the CCIA, we decline to follow those cases and instead turn to an application of our balancing test

to the facts before us. As to the first factor, we agree with the Simons that Colorado law does not treat the CCIA as an arm of the state. The statute creating the CCIA states in relevant part:

> There is hereby created the Colorado compensation insurance authority which shall be a body corporate and a political subdivision of the state. The authority shall not be an agency of the state government, nor shall it be subject to administrative direction by any state agency except as provided in this article, and except for the purposes of the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S., and except for inclusion in the risk management fund and by the division of risk management as provided in part 15 of article 30 of title 24, C.R.S.

§ 8-45-101(1), 3B C.R.S. (1990 Supp.) (emphasis added). On its face, then, the express language of the statute establishes that the Authority is not a state agency. In fact, the statute characterizes the CCIA as a "body corporate" and a "political subdivision of the state." These are well established terms that denote entities such as counties and municipalities that are not arms of the state. *See City of Durango v. Durango Transp., Inc.*, 807 P.2d 1152, 1156 (Colo. 1991). As the Supreme Court concluded in *Mt. Healthy* and *Lake Country Estates*, we find that the enabling statute in this case suggests the CCIA should not be treated as an arm of the state.

Our recent decision in *Denver Area Labor Federation, AFL-CIO v. Buckley*, 924 P.2d 524 (Colo. 1996), does not require a contrary result. In *Buckley*, we found that CCIA funds constituted "public monies" under section 1-45-116(1)(a), 1B C.R.S. (1980 & 1994 Supp.) of the Campaign Reform Act. The Campaign Reform Act precludes any "agency, department, board, division, bureau, commission, or council of the state or any political subdivision thereof" from expending "public monies from any source . . . to urge electors to vote in favor of or against any issue before the electorate." § 1-45-116(1)(a), 3B C.R.S. (1994 Supp.). Because the CCIA enabling statute quoted above designates the CCIA as a political subdivision of the state and the term "public monies" was so broadly inclusive, we held in *Buckley* that the CCIA was prohibited from contributing money from the fund to promote or oppose an amendment to the Colorado Constitution. We did not expressly or by necessary implication hold in *Buckley* that the CCIA was an arm of the state.

As to the second factor, we find that the CCIA is sufficiently autonomous from the state, both administratively and financially, to be considered a "person" under § 1983. Both in form and in substance, the legislature has declared that the CCIA is not a state agency. As noted above, the CCIA is defined in its enabling statute as a "body corporate and political subdivision of the state." § 8-45-101(1), 3B C.R.S. (1990 Supp.). The CCIA has the power to sue and be sued and to enter into contracts. *See* § 8-45-103(2), 3B C.R.S. (1990 Supp.). The revenue collected by the CCIA is derived from premiums and not from state-imposed sales, use, property or income taxes. Also, the amount of liability that the CCIA can incur is statutorily limited to the extent of assets of the Fund derived from premium payments. *See* § 8-45-102(1), (4), 3B C.R.S. (1990 Supp.). The CCIA's autonomy from the state is emphasized by the fact that its

employees are exempted from the state personnel system. *See* § 8-45-101(9), (10), 3B C.R.S. (1996 Supp.); *cf.* Colo. Const. art. XII, § 13(2) (providing that, with certain exceptions not including the CCIA, "[t]he personnel system of the state shall comprise all appointive public officers and employees of the state."). These factors indicate that the legislature intended the CCIA to be self-sufficient and independent of the state itself.

Section 8-45-103(2) states:

> [T]he manager shall manage and conduct all business and affairs . . . in the name of the [CCIA], and in that name, . . . the manager may:
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> (a)(I) Sue and be sued in all the courts of this state . . . in actions arising out of any act, deed, matter, or thing made, omitted, entered into, done, or suffered in connection with the [CCIA] fund and the administration, management, or conduct of the business or affairs relating thereto . . . .
>
> (II) Nothing in this paragraph (a) shall be construed to waive any provisions of the "Colorado Governmental Immunity Act" . . . nor shall it be construed to waive immunity of the state of Colorado from suit in federal court, guaranteed by the eleventh amendment to the constitution of the United States.

§ 8-45-103(2), 3 C.R.S. (1997). On its face, subsection 103(2)(a)(II) is limited to subsection 103(2)(a) and does nothing more than declare that the state of Colorado does not waive its own immunity from suit by authorizing the CCIA to sue and to be sued. It does not equate the CCIA with the state itself. *See id.* Further, we note that when the legislature expressly included the CCIA in the Governmental Immunity Act, it made no reference to the state's Eleventh Amendment immunity. *See* § 8-45-101(1), 3 C.R.S. (1997).

To the extent that there is any ambiguity in the enabling act, its legislative history supports our conclusion that the legislature intended to create the equivalent of a private insurance company.[10] The major structural change occurred when the state fund, the SCIF, was abolished and the state authority, the SCIA, was created in 1987. The legislature cut the financial ties that bound the fund to the legislature by exempting the authority from the legislative budget process so that the authority could operate with more flexibility as a private entity. Senator Steven J. Durham, the Senate sponsor of the bill to create the authority, stated, "[I]n terms of management, we are going to treat this like an insurance company . . . . The new entity is not under the legislative budget process . . . . [T]he managers of this operation have the flexibility that any board of directors would have . . . ." Debate on S.B. 22 Before the Senate,

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[10] In interpreting a statute, courts must give effect to intent giving rise to the legislation. *See Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049 (Colo. 1995). In determining that intent, we look first to the plain meaning of the statutory language. If that language is ambiguous, we may consider, among other aids: (a) the circumstances under which the statute was enacted; (b) the legislative history; and (c) the consequences of a particular construction. *See People v. McNeese*, 892 P.2d 304 (Colo. 1995); § 2-4-203, 1 C.R.S. (1997).

55th General Assembly, 2d Reg. Sess. (Hearing Tape 86-14, Feb. 27, 1986, at 10:15 a.m.). Additionally, John Berry, representative of the SCIA, testified in 1990 that the SCIA wanted to change its name in order to gain even further autonomy from the state. He stated, "[W]e're looking to further separate ourselves from the state agency and that's why we ask to have the term 'State' stricken from our name and just [change it to] 'Colorado Compensation Insurance Authority' . . . ." Hearing on H.B. 1160 Before the House Committee on Agriculture, Livestock, and Natural Resources, 57th General Assembly, 2d Reg. Sess. (Hearing Tape 90-3, Jan. 17, 1990, at 2:17 p.m.).

Further, the applicability of the Immunity Act to the CCIA cannot be dispositive with respect to whether the CCIA is an arm of the state or a person for § 1983 actions because the protections of the Immunity Act are not limited to arms of the state. For example, the Immunity Act protects cities and municipalities, as well as state agencies.[11] For § 1983 purposes cities and municipalities are persons, not arms of the state. *See Monell*, 436 U.S. at 690; *County of Adams v. Hibbard*, 918 P.2d 212, 216 (Colo. 1996). By including the CCIA in the Immunity Act, the legislature did no more than treat the CCIA like a city, which under *Monell* is a person subject to suit under § 1983.

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[11] The Colorado Governmental Immunity Act extends its protections to the state and its political subdivisions including "public entities." The statutory definition of public entity includes "the state, county, city and county, incorporated city or town, school district, special improvement district, and every other kind of district, agency, instrumentality or political subdivision of the state organized pursuant to law." § 24-10-103(5), 10A C.R.S. (1988).

Based on its enabling act, we conclude that the legislature intended the CCIA to operate as much like a private insurance company as possible. Employers pay premiums to the Fund, the CCIA receives and processes claims, and then makes disbursements to claimants out of the Fund. *See* §§ 8-45-115 to -118, 3B C.R.S. (1990 Supp.). The CCIA clearly was structured so that it would be more responsive and efficient than a state agency which is subject to all of the constitutional and statutory constraints placed on the state. We therefore find that the legislature's expressed intent to grant the CCIA autonomy and to insulate the state from fiscal responsibility for the CCIA's conduct strongly supports the conclusion that, under the second factor, the CCIA should be treated as a "person" for § 1983 purposes.

CCIA's best argument is based on the third factor. As noted above, the enabling statute creating the CCIA states that it is not a state agency and is not subject to the control of any other state agency, "except for the purposes of the 'Colorado Governmental Immunity Act' . . . and except for inclusion in the risk management fund and by the division of risk management . . . ." § 8-45-101(1), 3B C.R.S. (1990 Supp.). The monies in the risk management fund are appropriated by the General Assembly to pay judgments entered against state agencies, *see* § 24-30-1510(3)(a), 10A C.R.S. (1988), and are held by the state treasurer. *See* § 24-30-1511, 10A C.R.S. (1996 Supp). Although the CCIA's enabling act states that it is not a state agency, section 24-30-1502(5), 10A C.R.S. (1996 Supp.) expressly defines CCIA as a "state agency" under the statute governing the Division of Risk Management. Therefore, we agree with the CCIA that a judgment in a § 1983 case might be paid out of the state treasury.

We are unable, however, to draw a definite conclusion that the state treasury automatically would pay a § 1983

liability award against the CCIA because it appears that the risk management fund is not the sole source for payment of a judgment against CCIA. The CCIA collects its own revenue from premiums paid by insureds and not from state-imposed sales, use, property or income taxes. *See* § 8-45-102, 3B C.R.S. (1996 Supp.). The monies in the CCIA Fund are meant to pay "losses sustained or liabilities incurred under the contracts or policies of insurance." *See* § 8-45-102(4), 3B C.R.S. (1996 Supp.). Any potential money judgment in this case may be considered a liability incurred under Simon's contract of insurance with CCIA. Moreover, the CCIA's enabling statute provides that the state shall not be liable for payments chargeable to the CCIA beyond the amount in the Fund. *See* § 8-45-102(1), 3B C.R.S. (1996 Supp.). Thus, the legislature apparently intended to shield the state from the liabilities of the CCIA. This tension or ambiguity between the CCIA's enabling statute and the provisions of the risk management fund statute leads us to conclude that the third factor lends only limited support to the CCIA's position because the state treasury is not clearly put at risk to pay a § 1983 judgment against the CCIA.[12]

VI.

Weighing the three applicable factors to determine whether the CCIA is a person or an arm of the state for § 1983 purposes, we conclude that the balance tips in favor of finding that the CCIA is not an arm of the state. Contrary to the CCIA's argument here, we find that the state treasury criterion alone is not dispositive. Further, our review of the enabling statute and the CCIA's history and

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[12] Determination of which fund would pay an actual § 1983 judgment against the CCIA must await a real case and would be decided in the first instance by the responsible administrators.

structure persuades us that the CCIA was specifically designed to be autonomous from the state. The legislature easily could have defined the CCIA as part of the state if it so wished. Instead, it has chosen to model the CCIA after a private insurance company to the greatest extent possible. Certainly, the legislature gave no fair notice of intent to insulate the CCIA from all § 1983 suits in state court. Rather, the legislature distanced the state from the Authority.

Finding that the CCIA may be sued under § 1983 is consistent with our caselaw specifically protecting the ability of litigants to sue political subdivisions of the state when the law is unclear. For example, in *Bertrand v. Board of County Commissioners of Park County*, 872 P.2d 223 (Colo. 1994), we held that because the Governmental Immunity Act was in derogation of common law, it must be strictly construed and unless immunity is clearly established, an entity is liable to suit. Similarly, under the facts of this case, sound public policy requires that any doubt be resolved in favor of allowing the § 1983 suit to proceed.

VII.

In conclusion, we hold that the CCIA is not an arm of the state and is therefore a "person" that can be sued under 42 U.S.C. § 1983. To hold otherwise would allow the CCIA to enjoy the benefits of acting as a private enterprise without the associated costs and responsibilities. Accordingly, we reverse the judgment of the court of appeals and direct that court to return the case to the district court for further proceedings consistent with this opinion.

CHIEF JUSTICE VOLLACK dissents, and JUSTICE KOURLIS joins in the dissent.

CHIEF JUSTICE VOLLACK dissenting:

The majority holds that the Colorado Compensation Insurance Authority (CCIA) is not an arm of the state for Eleventh Amendment purposes and consequently is a "person" that may be sued pursuant to 42 U.S.C. § 1983 (1994). A review of the three factors used by the majority in making this determination leads me to a different result. Accordingly, I dissent.

I.

Section 1983 provides that any "person" who, under color of state law, deprives an individual of his or her constitutional rights may be sued for damages. However, the United States Supreme Court has held that states, largely due to their Eleventh Amendment immunity, are not "persons" that can be subjected to § 1983 liability in actions filed in state courts. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64-66 (1989). In determining whether a government entity should also be afforded immunity from suits brought pursuant to § 1983, federal courts have determined that government entities deemed to be arms of the state are entitled to enjoy the same immunity as the state itself. *See Watson v. University of Utah Med. Ctr.*, 75 F.3d 569, 574 (10th Cir. 1996).

Although federal courts have relied upon a variety of factors in determining whether a political entity is an arm of the state, the majority analyzes this question using the following three "dominant" factors: (1) the characterization of the entity by state law; (2) the degree of autonomy the entity enjoys from state control; and (3) whether a judgment

against the entity will ultimately be paid with state funds. Maj. op. at 19.[1] In weighing these three factors as they relate to the CCIA, the majority concludes that "the balance tips in favor of finding that the CCIA is not an arm of the state." Maj. op. at 36-37. I disagree.

A.

Under the majority's first factor, the CCIA's enabling act indicates that the General Assembly's characterization of the CCIA is ambiguous. Section 8-45-101(1), 3B C.R.S. (1995 Supp.),[2] provides in relevant part that

> [t]here is hereby created the Colorado compensation insurance authority which shall be a body corporate and a political subdivision of the state. The authority shall not be an agency of state government, nor shall it be subject to administrative direction by any state agency except as provided in this article, and except for the purposes of the "Colorado Governmental Immunity Act" . . . and except for inclusion in the risk management fund . . . .

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[1]As the majority notes, no federal precedent supports limiting this court's analysis to three particular factors. *See* maj. op. at 15.

[2]Minor changes were made to this section in 1996 after the facts giving rise to this appeal arose.

While section 8-45-101(1) defines the CCIA as "a political subdivision of the state," it also treats the CCIA as a state agency for purposes of the Colorado Governmental Immunity Act (Immunity Act) and the risk management fund. *See* also § 24-30-1502(5), 7 C.R.S. (1997) (including the CCIA within the risk management fund's definition of "state agency").[3] Besides treating the CCIA as a political subdivision and state agency, the General Assembly has also structured the CCIA to resemble a private insurance company. *See* § 8-45-115, 3 C.R.S. (1997); § 8-45-118, 3 C.R.S. (1997) (employers pay premiums into the CCIA fund, claims are received and processed by the CCIA, and disbursements are paid out of the CCIA fund); § 8-45-117, 3 C.R.S. (1997) (CCIA is subject to regulation by the commissioner of insurance); § 8-45-102(2), 3 C.R.S. (1997) (CCIA fund manager is authorized to act in the same manner "as the head of a private insurance company").

Because the General Assembly has simultaneously characterized the CCIA as a political subdivision, state agency, and private insurance company, any arm-of-the-state analysis based upon the state's characterization of the CCIA is destined to result in ambiguity. For this reason, the first factor presented by the majority offers little guidance in determining whether the CCIA is an arm of the state.[4]

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[3]Additionally, the evolution of the CCIA's given name evinces that the CCIA has been historically characterized as a state entity. *See* § 8-54-102(1), 3 C.R.S. (1973) (state compensation insurance fund); § 8-54-102.5(1), 3B C.R.S. (1986) (state compensation insurance authority); § 8-45-101(1), 3B C.R.S. (1996 Supp.) (Colorado compensation insurance authority).

[4]Contrary to the majority's assertions, the CCIA cannot be categorized with municipalities and counties because it is not constrained by geographical boundaries and local issues. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280

B.

A careful review of the second factor in the majority's analysis indicates that, despite having some of the characteristics of a private insurance company, the CCIA is far from autonomous.

Regarding personnel, the CCIA operates through a board of directors consisting of seven members, all of whom are appointed by the governor with the consent of the Senate. *See* § 8-45-101(2)(a), 3 C.R.S. (1997). Compensation for members of the board is set by the General Assembly at one hundred forty dollars per diem plus expenses. *See* § 8-45-101(3), 3 C.R.S. (1997). Until 1987, all employees of the CCIA's predecessor, the state compensation insurance authority (SCIA), were state employees. *See* § 8-54-102.5(9), 3B C.R.S. (1986).[5]

The CCIA accepts all applications for insurance, regardless of risk. *See Bastian v. Martinez*, 698 P.2d 1373,

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(1977); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401-02 (1979) (seizing upon the importance of local characteristics of government entity.)

By filling in the gaps in coverage created when private carriers refuse to insure high-risk employers, the CCIA performs an important statewide function by providing affordable insurance "for the benefit of injured and the dependents of killed employees." *See* § 8-45-102(1), 3 C.R.S. (1997). In this sense, the CCIA more closely resembles a state agency than a municipality or county.

[5]CCIA employees are no longer considered state employees; however, section 8-45-101(9), 3 C.R.S. (1997), provides that anyone employed by SCIA prior to July 1, 1987, could elect, before July 1, 1992, to retain their state employee status.

1374 (Colo. App. 1984); § 8-45-101(5)(e.5), 3 C.R.S. (1997) (the board shall not refuse to insure any employer due to risk of loss). Prior to 1987, the executive director of the department of labor and employment was responsible for setting the rates for CCIA insurance. *See* § 8-54-105, 3B C.R.S. (1986). While rate-setting discretion now rests with the board, section 8-45-106, 3 C.R.S. (1996 Supp.), limits that discretion by requiring the board to provide its insurance at cost and set "the lowest possible rates of premium consistent with the maintenance of a solvent state compensation insurance authority fund." Section 8-45-107, 3 C.R.S. (1997), further limits the board's discretion by providing the board with its basis for setting rates.

The CCIA's legislative scheme also calls for considerable state oversight. Section 8-45-121(1), 3 C.R.S. (1997), provides that the CCIA fund "shall be open to visitation by the commissioner of insurance at all reasonable times." The commissioner of insurance is also required to conduct an examination of the CCIA fund at least once every three years and report his or her findings to the governor, General Assembly, and department of labor and management. *See* § 8-45-121(4), 3 C.R.S. (1997). Each year, the state auditor conducts an audit of the CCIA's financial condition and submits a report, complete with recommendations and comments, to the governor, General Assembly, and department of labor and management. *See* § 8-45-121(2), 3B C.R.S. (1996 Supp.). Finally, the CCIA fund manager is required to submit an annual report to the governor and joint budget committee regarding the business operations, resources, and liabilities of the CCIA fund. *See* § 8-45-122, 3B C.R.S. (1996 Supp.).

As to control over the CCIA fund itself, the state treasurer serves as its custodian and is responsible for investing any portion of the fund, including its surpluses and

reserves, which is not needed for immediate use. *See* § 8-45-118(1), 3 C.R.S. (1997); § 8-45-120(1), 3 C.R.S. (1997). This court has also limited the CCIA's autonomy over the fund. *See Denver Area Labor Fed'n, AFL-CIO v. Buckley*, 924 P.2d 524, 529 (Colo. 1996). In *Buckley*, this court held that section 1-45-116(1)(a), 1B C.R.S. (1996 Supp.), of the Campaign Reform Act prohibits the CCIA from expending its "public moneys" on certain political activities. *See Buckley*, 924 P.2d at 529. In so holding, this court explained that "[w]hile moneys collected by the [CCIA] are not derived from state-imposed sales, use, property, or income taxes, those moneys may be spent by the CCIA only for authorized public purposes." *Id.* at 528.[6] *Buckley* therefore places a dual limitation on the CCIA's autonomy by defining the CCIA fund as "public moneys" even though the CCIA fund is derived from private sources, and by restricting the use of the CCIA fund to "authorized public purposes."

The CCIA's enabling act reflects that, although the General Assembly has patterned the CCIA after a private insurance company, the CCIA resembles a private insurance company only when it is convenient for administrative purposes. Otherwise, the state has substantial control over all facets of the CCIA's operation. Viewing the enabling act in combination with this court's willingness to treat the CCIA as a public entity, the CCIA clearly does not function as an autonomous entity despite its seemingly private form.

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[6]I filed a dissent to the majority's opinion in *Buckley* to state my position that the moneys collected by the CCIA are not public funds subject to section 1-45-116(1)(a). *See Buckley*, 924 P.2d at 530-33 (Vollack, C.J., dissenting).

C.

The third factor the majority sets forth in determining that the CCIA is not an arm of the state concerns whether the state is ultimately liable for a judgment, if rendered, against the CCIA. As the United States Supreme Court recently explained in *Regents of the University of California v. Doe*, 117 S. Ct. 900, 904 (1997), "the question whether a money judgment against a State instrumentality or official would be enforceable against the State is of considerable importance to any evaluation of the relationship between the State and the entity or individual being sued." *See also Austin v. State Indus. Ins. System*, 939 F.2d 676, 678 (9th Cir. 1991) (explaining that potential impact on the state treasury is a "central concern" in an Eleventh Amendment inquiry). These cases suggest that the question of whether the state is obligated to pay a judgment rendered against the state entity is of critical importance to any Eleventh Amendment analysis.

As set forth above, section 8-45-101(1) provides in part that the CCIA "shall not be an agency of state government . . . except for the purposes of the 'Colorado Governmental Immunity Act' . . . and except for inclusion in the risk management fund." In other words, the CCIA is considered a state agency for liability purposes and enjoys the protections of both the Immunity Act and the risk management fund. *See* § 24-30-1502(5) (defining the term "state agency" to include the CCIA for purposes of the risk management fund). While the Immunity Act concerns state law causes of action, the risk management fund protects state agencies from suits brought pursuant to federal law. *See* § 24-30-1510(3)(a), 7 C.R.S. (1997). Therefore, the General Assembly has chosen to expressly designate the CCIA as a state agency in situations where it is sued under federal law--precisely the situation posed by the present case.

The General Assembly's unwillingness to subject the CCIA to responsibility for a § 1983 judgment is also evident from the manner in which the CCIA collects funds. Because it must provide its subscribers with at-cost insurance, the CCIA is unable to generate additional revenue to satisfy § 1983 judgments. *See* § 8-45-106. This problem is further exemplified by the manner in which the CCIA is required to set its rates. *See* § 8-45-107(2).[7] These statutes indicate that the General Assembly has not only chosen to assume responsibility for a § 1983 judgment rendered against the CCIA, but it has also refused to give the CCIA the means to afford the financial burden that comes with such a judgment.

The majority seizes upon language in section 8-45-102(1) which provides that "[s]uch administration shall be without liability on the part of the state, beyond the amount of said fund" to support its conclusion that the General Assembly apparently intended to shield itself from CCIA liability. This assertion is flawed in two respects. First, the above-quoted reference in section 8-45-102(1) is clearly limited to the "administration" of the CCIA fund, which

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[7]Section 8-45-107(2) provides:

> The rates so made shall be that percentage of the payroll of any employer which, on the average, shall produce a sufficient sum to:
>
> (a) Carry all claims to maturity such that the rates shall be based upon the reserve and not upon the assessment plan;
>
> (b) Produce a reasonable surplus as provided in articles 40 to 47 of this title, and to cover the catastrophe hazard, and to insure the payment to employees and their dependents of the compensation provided in said articles.

would presumably only cover claims made under CCIA insurance policies. Second, reading this statute in such a manner renders the multiple statutes classifying the CCIA as a state agency for purposes of the Immunity Act and risk management fund meaningless. *See Rodriguez v. Schutt*, 914 P.2d 921, 925 (Colo. 1996) (explaining that a court must read and consider a statute as a whole to give consistent, harmonious, and sensible effect to all of its parts).

The majority ignores the more relevant section 8-45-103(2), 3 C.R.S. (1997), which provides in part as follows:

> The manager shall manage and conduct all business and affairs . . . in the name of the [CCIA], and in that name . . . the manager may:
>
> (a)(I) Sue and be sued in all the courts of this state . . . in actions arising out of any act, deed, matter, or thing made, omitted, entered into, done, or suffered in connection with the [CCIA] fund and the administration, management, or conduct of the business or affairs relating thereto; and the manager shall be authorized to employ counsel to represent the fund in any action.
>
> (II) Nothing in this paragraph (a) shall be construed to waive any provisions of the "Colorado Governmental Immunity Act" . . . nor shall it be construed to waive immunity of the state of Colorado . . . guaranteed by the

> eleventh amendment to the constitution of the United States.

(Emphasis added.) The meaning of section 8-45-103(2)(a)(II) is clear. While section 8-45-103(2)(a)(I) allows the CCIA to sue and be sued for acts arising out of its "business or affairs," section 8-45-103(2)(a)(II) clearly provides that nothing in that section shall be construed to waive the CCIA's Eleventh Amendment immunity as a state agency.

The majority also contends that the third factor lends only limited support for finding that the CCIA is an arm of the state because it remains to be seen whether the CCIA or the state would actually pay such a judgment if rendered. However, federal law does not require that the state's obligation to pay be definite. In fact, several circuit courts have found organizations to be arms of the state even though the state's obligation to pay was only a possibility. *See Haldeman v. State of Wyoming Farm Loan Bd.*, 32 F.3d 469, 473-74 (10th Cir. 1994) (explaining that "it is apparent that a monetary judgment would possibly be paid from state funds. It is this possibility which this court has previously recognized as an influencing factor."); *Austin*, 939 F.2d at 679 (finding that "[w]e cannot say that a monetary judgment against [the organization] inevitably would have an impact on the state treasury. However, this disclaimer is not fatal to [the organization's] claim of immunity").

The General Assembly's inclusion of the CCIA within the protections afforded by the risk management fund establishes conclusive support for finding that the CCIA is an arm of the state. Section 8-45-103(2)(a)(I) provides further support for this conclusion. Contrary to the majority's assertions, the unanswered question of who would

actually pay a judgment rendered against the CCIA has little, if any, bearing on whether the CCIA is an arm of the state.

D.

Using the three factors presented in the majority opinion, I believe that the CCIA is an arm of the state deserving Eleventh Amendment immunity. Although the CCIA is defined as a political subdivision, the General Assembly has ambiguously characterized the CCIA as a hybrid political entity that possesses attributes of both a state agency and a private insurance company. The General Assembly has also limited the CCIA's autonomy by retaining substantial control and oversight over the CCIA's entire operation. Finally, the General Assembly has designated the CCIA as a state agency for liability purposes and included the CCIA within the protections of the risk management fund. Although the question of whether the state or the CCIA would bear the ultimate cost of a § 1983 judgment remains undecided, the fact that the state has agreed to pay such a judgment is compelling evidence that the CCIA is an arm of state.

The holdings of two federal circuit courts of appeal support this conclusion. *See Austin*, 939 F.2d at 679; *Lipofsky v. Steingut*, 86 F.3d 15, 17 (2d Cir. 1996). In *Austin*, the Ninth Circuit Court of Appeals held that the Nevada State Industrial Insurance System was an arm of the state for Eleventh Amendment immunity purposes. *Id.* at 679. Similarly, the Second Circuit Court of Appeals recently held in *Lipofsky* that although the New York State Insurance Fund, "in certain respects . . . functions similarly to a private insurer, we conclude that it is nonetheless a State agency entitled to Eleventh Amendment immunity." *Id.* at 16. As the majority's opinion suggests, we must follow federal law in considering this issue. Despite the majority's

attempts to distinguish these cases, both stand for the proposition that state insurance authorities are arms of the state that deserve Eleventh Amendment immunity. In my view, there is no reason to disregard this federal precedent.

II.

The CCIA is a state-created entity that serves the public function of providing workers' compensation insurance to all Colorado employers, regardless of risk. In my view, this entity is an arm of the state protected by the Eleventh Amendment. For this reason, I would affirm the court of appeals and uphold the trial court's dismissal of the § 1983 complaint. Accordingly, I dissent.

I am authorized to say that JUSTICE KOURLIS joins in this dissent.

APPENDIX B

SUPREME COURT, STATE OF COLORADO

NO. 95SC304 January 13, 1997

MARK SIMON, CHERYL SIMON, AND MALACHAI SIMON, Petitioners,

v.

THE STATE COMPENSATION INSURANCE AUTHORITY, THE STATE COMPENSATION INSURANCE FUND, and THE COLORADO COMPENSATION INSURANCE AUTHORITY, Respondents.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT AFFIRMED

JUSTICE KIRSHBAUM delivered the Opinion of the Court.
JUSTICE MULLARKEY dissents, and JUSTICE SCOTT and JUSTICE HOBBS join in the dissent.
JUSTICE SCOTT dissents.

In *Simon v. State Compensation Insurance Authority*, 903 P.2d 1139 (Colo. App. 1994), the Colorado Court of Appeals affirmed a judgment entered by the trial court dismissing state and federal claims asserted by plaintiffs-petitioners Mark Simon (Simon), Cheryl Simon, and Malachai Simon, hereinafter collectively referred to as "the plaintiffs," against defendants-respondents the Colorado Compensation Insurance Authority (the Authority), the State Compensation Insurance Authority (the State Authority), and the State Compensation Insurance Fund (the Fund).[1] The

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[1]The court of appeals held specifically that the Authority is not a person for purposes of 42 U.S.C. § 1983 and that such conclusion "is true for each of its predecessors." *Simon*, 903 P.2d at 1147. The plaintiffs requested certiorari review of the following issues:

> (1) Did the Court of Appeals err in holding that Respondents The State Compensation Insurance Authority, The State Compensation Insurance Fund, and The Colorado Compensation Insurance Authority (collectively referred to as "CCIA") is a "public entity" thereby entitling it to governmental immunity?
>
> (2) Did the Court of Appeals err in holding that C.R.S. § 8-45-101, which purportedly confers

court of appeals determined, *inter alia*, that Simon could not pursue a claim based on alleged violations of 42 U.S.C. § 1983 because the defendants are not persons for purposes of that statute. *Simon*, 903 P.2d at 1145-47. Having granted certiorari to review the propriety of this determination respecting Simon's section 1983 claim, we affirm.

> governmental immunity on CCIA, is constitutional?
>
> (3) Did the Court of Appeals err in holding that CCIA is not a "person" or is "an arm of the state" within the meaning of 42 U.S.C. § 1983, thereby precluding the Simons['] claim on that basis?
>
> (4) Did the Court of Appeals err in affirming the Trial Court's dismissal of Mr. Simon's invasion of privacy claim based upon federal law?

This court granted certiorari review only with respect to the third issue.

The § 1983 claim was asserted only by Simon. The first issue as formulated by Simon for our certiorari review refers to all three defendants "collectively" as the Authority and Simon argued to the court of appeals that the "defendants" were persons for purposes of § 1983. *Simon*, 903 P.2d at 1145. However, in view of the briefs filed here and with the court of appeals by Simon, we do not consider the arguably distinct questions of whether the various funds or the State Authority were or are "persons" for purposes of § 1983.

I

According to the allegations contained in the plaintiffs' amended complaint,[2] Simon and his business partners obtained a workers' compensation insurance policy with the Fund in 1982. Simon became a sole proprietor in 1984, notified the Fund that he was now the insured and paid all requisite insurance premiums from that date through January 1985.

In January 1985, Simon suffered a pelvic injury during the course of his employment and filed a claim with the Fund. The Fund denied the claim on the basis that as a sole proprietor Simon was not insured under the policy. Simon initiated appropriate administrative proceedings to challenge

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[2]The record on appeal does not contain any documents relative to the underlying administrative proceedings. The record contains the original and amended complaints, a motion to dismiss and briefs filed in relation thereto, a motion for reconsideration and briefs filed in relation thereto, and various trial court orders. In determining whether Simon's § 1983 claim was properly dismissed for failure to state a claim, the allegations of his complaint are assumed to be true. *Destefano v. Grabrian*, 763 P.2d 275, 278 (Colo. 1988).

this ruling and an Administrative Law Judge (ALJ) determined that Simon's injuries were covered by the terms of the policy.

In July 1987, pursuant to legislation adopted by the General Assembly, the State Authority assumed the responsibility previously exercised by the Fund for payments of claims pursuant to Simon's policy. §§ 8-54-102, -102.5, 3B C.R.S. (1986). The State Authority subsequently informed Simon that in its judgment he was not entitled to temporary disability benefits or medical benefits. Simon sought administrative relief from this determination and an ALJ concluded that Simon was entitled to temporary disability benefits and medical benefits pursuant to his policy. The State Authority filed a request for review of these determinations with the Industrial Claims Appeals Panel, which Panel affirmed the ALJ's orders.

The State Authority subsequently filed a general admission of liability regarding temporary and total disability but maintained that it was entitled to an offset by reason of a

settlement between Simon and a third party. Simon objected to this admission and filed a motion to reopen the issue regarding offsets to which the State Authority might be entitled. With respect to this issue, the ALJ issued an order in favor of Simon, which order was affirmed by the Industrial Claims Appeals Panel.

In July 1990, pursuant to legislation adopted by the General Assembly, the Authority assumed the responsibilities previously exercised by the State Authority. § 8-45-101, 3B C.R.S. (1990 Supp.). The Authority made no payments to Simon until September 1992. By that time, Simon had become involved in legislative processes with respect to workers' compensation legislation. As a result of these activities the Authority released private and confidential information as well as false information regarding Simon to the public. On April 13, 1993, the plaintiffs initiated this civil action. The complaint, as ultimately amended, contains state law claims of bad faith and breach of fiduciary duty, outrageous conduct, loss of consortium, interference with

familial relations, and invasion of privacy; claims of violations of state and federal law with respect to the publication of "false, confidential and/or private statements" about Simon; and Simon's claim alleging violations of 42 U.S.C. § 1983. With respect to his section 1983 claim, Simon alleged that the defendants' conduct constituted violations of his rights to equal protection and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

The defendants filed a motion to dismiss the amended complaint, asserting that the plaintiffs' state law claims were barred by the Colorado Governmental Immunity Act, sections 24-10-101 to -120, 10A C.R.S. (1988), and that Simon failed to state a section 1983 claim against the defendants because they were not persons for purposes of that article. The trial court agreed with the defendants' arguments and dismissed the action.

On appeal, the court of appeals affirmed the trial court's judgment. Relying on *Austin v. State Industrial Insurance*

System, 939 F.2d 676 (9th Cir. 1991), and *Wigger v. McKee*, 809 P.2d 999 (Colo. App. 1990), the court concluded that the Authority is not a person for purposes of section 1983. *Simon*, 903 P.2d at 1147.

II

The federal statute in question, 42 U.S.C. § 1983 (1994), contains the following pertinent provisions:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Only persons are subject to the remedies established by section 1983. § 1983; *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

Cities and municipalities are persons for purposes of section 1983. *Monell v. Department of Soc. Servs.*, 436

U.S. 658, 690 (1978); *Collins v. City of Harker Heights*, 503 U.S. 115 (1992); *Owen v. City of Independence*, 445 U.S. 622, 635 (1980); *County of Adams v. Hibbard*, 918 P.2d 212, 216 (Colo. 1996), *cert. denied*, 117 S. Ct. 483 (1996). States and entities deemed to be arms of the state, however, are not persons for purposes of section 1983 and thus are not subject to suit for violations of that section. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70-71 (1989). While the ultimate question of whether the Authority is a person for purposes of section 1983 is a question of federal law, *Howlett v. Rose*, 496 U.S. 356, 375-76 (1990); *City of Lakewood v. Brace*, 919 P.2d 231, 238 (Colo. 1996), the determination of that question requires careful examination of the status, conduct, and responsibilities of the Authority as established by state law.

A

The Eleventh Amendment to the United States Constitution contains the following language: "The Judicial power of

the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." In spite of this language, the amendment is applicable to suits by citizens of one state against that state. *Hans v. Louisiana*, 134 U.S. 1, 15 (1890); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 472 (1987). *But see Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29 (1989) (Scalia, J., concurring and dissenting) (analyzing the doctrinal and policy basis for Hans); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting) (criticizing the Court's Eleventh Amendment doctrine for diverging from text and history). Furthermore, the Eleventh Amendment by its terms establishes a limitation on the jurisdiction of federal courts, not state courts. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63-64 (1989); *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980).

In *Will*, the Supreme Court held that in suits filed in state courts governmental entities considered "arms of the State" for Eleventh Amendment purposes are not persons for purposes of section 1983. *Will*, 491 U.S. at 70. In view of this holding, many state courts have concluded that an Eleventh Amendment analysis must be adopted to determine whether a particular state-created governmental entity is a person for purposes of section 1983, even though the Eleventh Amendment does not limit state court jurisdiction. *See Town of Lake Clarke Shores v. Page*, 569 So. 2d 1256, 1257 (Fla. 1990); *Board of Trustees v. Landry*, 638 N.E.2d 1261, 1264 (Ind. Ct. App. 1994); *Fuchilla v. Layman*, 537 A.2d 652, 655 (N.J. 1988) (decided prior to *Will*); *C.J. v. Vuinovich*, 599 A.2d 548, 553 (N.J. Super. Ct. App. Div. 1991); *Livingood v. Meece*, 477 N.W.2d 183, 190-91 n.5 (N.D. 1991); *Williams v. State*, 589 A.2d 840, 844 (Vt. 1990). At least one court, however, has suggested that the analysis for determining whether a state-created govern-

mental entity is a person for purposes of section 1983 is different than the analysis for determining whether the entity is an arm of the state for purposes of Eleventh Amendment immunity. *See Daddow v. Carlsbad Mun. Sch. Dist.*, 898 P.2d 1235, 1239 (N.M. 1995), *cert. denied*, 116 S. Ct. 753 (1996). In our view, the question of whether a state-created entity is an arm of the state and therefore a person for purposes of section 1983 is a question of federal law. *Will* thus requires state courts to determine whether such an entity would be protected by the Eleventh Amendment from suit in a federal court.

In *Uberoi v. University of Colorado*, 713 P.2d 894 (Colo. 1986), decided prior to *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), we held that the Eleventh Amendment is inapplicable to section 1983 claims

initiated in state courts. *Uberoi*, 713 P.2d at 899-900. That conclusion is hereby overruled.[3]

The United States Supreme Court has consistently adhered to the principle that the Eleventh Amendment prohibits federal courts from exercising jurisdiction in suits against a state and arms of the state brought not only by citizens of another state or foreign state but also by a state's own citizens invoking federal question jurisdiction, upon the rationale that the Eleventh Amendment embodies general principles of state sovereign immunity that prohibit suits against a state without the state's consent. *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478-88 (1987); *Hans v. Louisiana*, 134 U.S. 1, 9-15 (1890). Furthermore, a state may assert its Eleventh Amendment immunity in an action for retrospective relief against a state official because the state will pay any judgment entered

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[3]We do not here consider whether, under Eleventh Amendment analysis, the University of Colorado should be deemed an arm of the state or a political subdivision of the state for purposes of § 1983 claims.

against that official and is thus considered the real party in interest even though the official is the nominal defendant. *Edelman v. Jordan*, 415 U.S. 651, 664-65 (1974); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945).

Congress may abrogate state Eleventh Amendment immunity pursuant to its power provided in Section Five of the Fourteenth Amendment to enforce the provisions of that amendment by appropriate legislation. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). If Congress intends to do so, however, it must unequivocally express such intent in the language of the statute. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-43 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). Furthermore, a state may waive its Eleventh Amendment immunity by consenting to suit in federal court, but an intent to waive such immunity will not be found unless unequivocally

expressed. *Atascadero*, 473 U.S. at 239-40; *Pennhurst*, 465 U.S. at 99.

In *Quern v. Jordan*, 440 U.S. 332 (1979), the Supreme Court determined that in enacting The Civil Rights Act of 1871, 42 U.S.C. § 1983, Congress did not intend to abrogate state Eleventh Amendment immunity in suits filed in federal courts. *Quern*, 440 U.S. at 341-45. However, the Court left unanswered the question of whether a state or arms of the state were subject to suits in state courts as persons for purposes of section 1983.

In *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), the plaintiff filed a civil action pursuant to section 1983 in a state court against the Michigan Department of State Police and the Director of State Police in his official capacity, thus raising the issue not addressed in *Quern*. The Supreme Court determined that a state is not a person for purposes of section 1983. *Will*, 491 U.S. at 64. The Court adopted a rule of statutory construction similar to

the principle it recognized in Eleventh Amendment cases that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Id.* at 65 (quoting *Atascadero*, 473 U.S. at 242, and citing *Pennhurst*, 465 U.S. at 99). The Court, relying upon *Quern*, held that in adopting section 1983 Congress did not intend to disturb traditional state Eleventh Amendment doctrine. *Will*, 491 U.S. at 66. The Court reasoned that Congress could not have intended to authorize claims for state action in state court proceedings while prohibiting such claims in federal courts when Congress' purpose in enacting section 1983 was to provide a federal forum for persons deprived of federally protected rights as an alternative to a state court forum. *Id.* Thus, a state-created entity cannot be deemed an arm of the state for purposes of Eleventh Amendment immunity in federal court proceedings and at the same time be deemed a person for

purposes of a section 1983 claim in state court proceedings. A contrary rule would result in the anomaly that the statutory term "person" would have different meanings depending on whether the forum were a state or federal court. In such a circumstance, state courts would in effect exercise exclusive jurisdiction over section 1983 claims against that entity.[4] This conclusion is reinforced by the following comments of the Supreme Court in *Howlett v. Rose*, 496 U.S. 356 (1990):

> As we held last Term in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), an entity with Eleventh Amendment immunity is not a "person" within the meaning of § 1983. The anomaly identified by the State Supreme Court, and by the various state courts which it cited, that a State might be forced to entertain

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[4]We do not suggest, however, that a lower federal court's determination that a state-created entity is an arm of the state for purposes of Eleventh Amendment immunity compels a state court to conclude that the same entity is not a person for purposes of § 1983. *See United State ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970) (decisions of lower federal courts on federal law are not conclusive on state courts); *People v. Barber*, 799 P.2d 936, 939-40 (Colo. 1990) (same). Rather, a state court must itself engage in an Eleventh Amendment analysis to determine whether the entity would be immune from suit in federal court had the action been brought in that court.

> in its own courts suits from which it was immune in federal court, is thus fully met by our decision in *Will*. *Will* establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal court or state court.

Id. at 365 (footnote omitted).

In *Will*, the court indicated that the scope of the Eleventh Amendment and the scope of section 1983 are separate issues. *Will*, 491 U.S. at 66. *Will* may be read to suggest that although states may waive Eleventh Amendment immunity by consenting to suit in federal court, such consent may not operate to bring the state within the statutory definition of the term "person" for purposes of section 1983. *See* 2 Steven H. Steinglass, *Section 1983 Litigation in State Courts* § 15.3(a) (Supp. 1996). This issue, however, is not before us.

B

There is no bright line test for determining whether a state-created governmental entity is an arm of the state for

purposes of Eleventh Amendment immunity. *In Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), the Supreme Court concluded that a local school board was not immune from suit in federal court under the Eleventh Amendment. In reaching that conclusion the Court considered the following factors: that state law classified the local school board as a "political subdivision," that the board was subject to some guidance from the state school board, that the local board received a significant amount of money from the state, and that the local board had the power to raise funds through the issuance of bonds or the levying of taxes. *Id.* at 280. The Court concluded that "[o]n balance" the local school board was "more like a county or city than it is like an arm of the State." *Id.*

In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), the Supreme Court determined that an agency created jointly by California and Nevada to coordinate and regulate land development in the

Lake Tahoe area was not immune from suit in federal court under the Eleventh Amendment. In that case, the Court considered the following factors: that neither state intended the agency to be immune; that the interstate compact described the agency as a political subdivision; that six members of the agency's ten-person governing board were appointed by counties and cities, while four were appointed by the states; that the counties provided funding to the agency; that obligations of the agency were not binding on either of the states; that the agency's function, the regulation of land use, is traditionally a function of local governments; and that the agency's rule-making authority was not subject to veto at the state level. *Id.* at 401-02. Thus the question of whether a particular entity is an arm of the state is to be determined by weighing various factors.

Because the Court referred to different factors in *Mt. Healthy* and in *Lake Country Estates*, and because the Court did not specify the relative importance of any particular

factor, lower federal courts have developed diverse balancing tests.[5] For example, the United States Court of Appeals for the Tenth Circuit has indicated that it considers such factors as "the state law characterization of the entity, the guidance and control that the state exercises over the entity, the degree of state funding the entity receives, and whether the state has empowered the entity to issue bonds and levy taxes." *Mascheroni v. Board of Regents of the Univ. of Cal.*, 28 F.3d 1554, 1559 (10th Cir. 1994); *see Watson v. University of Utah Med. Ctr.*, 75 F.3d 569, 574-75 (10th Cir. 1996) (examining the entity's degree of autonomy and the extent of financing received independent of the state treasury and its ability to provide for its own financing); *Ambus v. Granite Bd. of Educ.*, 995 F.2d 992, 994 (10th Cir. 1993) (applying the four *Mt. Healthy* factors); *see also Unified Sch. Dist.*

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[5]For a survey of the tests adopted by the various lower federal courts, see Alex E. Rogers, Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 Colum. L. Rev. 1243, 1269-71 (1992).

No. 480 v. Epperson, 583 F.2d 1118, 1121-22 (10th Cir. 1978) (considering the extent to which an entity carrying out a state mission functions autonomously from the state government and is financed independently of the state treasury).

1

One important factor relevant to the determination of whether a particular governmental entity is an arm of the state for purposes of Eleventh Amendment immunity is "the nature of the entity created by state law." *Mt. Healthy*, 429 U.S. at 280. Any legislative declaration of purpose and any judicial decision regarding the entity's characteristics and powers are relevant to this inquiry.

We recognize that lower federal courts do not fully agree to what extent characterization of the entity under state law controls the question of whether the entity is an arm of the state for purposes of Eleventh Amendment immunity. *See, e.g., Huber, Hunt & Nichols, Inc. v. Architectural*

Stone Co., 625 F.2d 22, 25 (5th Cir. 1980) (state law "subsumes" all other factors); *Blake v. Kline*, 612 F.2d 718, 722 (3d Cir. 1979) (state law is "under certain circumstances a controlling factor"); *Korgich v. Regents of the N.M. Sch. of Mines*, 582 F.2d 549, 551 (10th Cir. 1978) (state law is "decisive"); *Rollins v. Board of Governors for Higher Educ.*, 761 F. Supp. 930, 931 (D.R.I. 1990) (state law "controls the issue"); *DeLong Corp. v. Oregon State Highway Comm'n*, 233 F. Supp. 7, 10 (D. Or. 1964) (federal courts will be "influenced" by state decisions), *aff'd*, 343 F.2d 911 (9th Cir. 1965). The confusion in the lower federal courts results in part from a failure to distinguish between the separate functions of the state and federal governments. The state necessarily determines the attributes of the entities it creates. Absent constitutional authority, it is generally not within the

province of the federal government to alter or define those attributes.[6]

2

Most federal courts consider the question of whether a judgment against the entity would ultimately be paid by the state to be a critical factor in the balancing equation. Support for consideration of this factor is generally found in *Edelman v. Jordan*, 415 U.S. 651 (1974), and *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945), wherein the Supreme Court determined that in actions for retrospective relief against state officials, because the state will pay any judgment entered against such official the state is the real, substantial party in interest and may invoke its Eleventh Amendment immunity even though the official is

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[6]Of course, federal courts can and often must determine issues of state law which have not been decided by the state. However, federal determinations of state law are not controlling. *Moore v. Sims*, 442 U.S. 415, 428 (1979); *Watson v. Buck*, 313 U.S. 387, 401 (1941) ("under our dual system of government [the state supreme court] has the last word on the construction and meaning of statutes of that state"); *High Gear & Toke Shop v. Beacom*, 689 P.2d 624, 628 n.1 (Colo. 1984).

the nominal defendant. *Edelman* and *Ford*, however, do not involve an arm of the state inquiry, and the purport of those decisions with respect to the development of arm of the state analysis is not clear.

Edelman and *Ford* also establish that Eleventh Amendment analysis is animated by concerns of federalism, specifically a reluctance to permit federal courts to render judgments affecting state treasuries. *Edelman*, 415 U.S. at 660-63; *Ford*, 323 U.S. at 467. However, the initial purpose of any arm of the state analysis is to distinguish between state-created entities functioning as arms of the state itself and entities that function as distinct political or corporate bodies within the state. *See Mt. Healthy*, 429 U.S. at 280 (determining whether an entity is more like a county or city than an arm of the state).

The fact that a federal court judgment against an entity would affect the state treasury will not in all instances distinguish arms of the state from political subdivisions. *See*

Edelman, 415 U.S. at 666-68 (discussing permissible ancillary effects on state treasury of prospective equitable relief). For instance, a state's decision to pay the judgments rendered against a municipality in federal court would not convert that municipality into an arm of the state entitled to Eleventh Amendment immunity. *See Gary A. v. New Trier High Sch. Dist. No. 203*, 796 F.2d 940, 945 (7th Cir. 1986) (state's decision to indemnify a political subdivision of the state does not grant that subdivision constitutional immunity). However, the fact that a state may be required under state law to assume the obligations of an entity would suggest a closer relationship.

In *Mt. Healthy*, the Supreme Court considered such details as whether the entity received significant funding from the state and had the power to raise revenue through the issuance of bonds or the levying of taxes. *Mt. Healthy*, 429 U.S. at 280. Many opinions of lower federal courts contain references to these factors. However, it is often not clear

whether such consideration is for the purpose of determining the potential impact on the state treasury, the state's control over the entity, or the legal powers of the entity. Furthermore, courts that rely on these considerations to determine potential impact on the state treasury do not agree as to the probability of impact that must be shown before this factor assumes controlling significance. *See Watson v. University of Utah Med. Ctr.*, 75 F.3d 569, 575-76 (10th Cir. 1996) (judgment "might be satisfied, at least indirectly" from state treasury); *Austin v. State Indus. Ins. Sys.*, 939 F.2d 676, 679 (9th Cir. 1991) (judgment "could impact" state treasury); *Travelers Indem. Co. v. School Bd.*, 666 F.2d 505, 509 (11th Cir. 1982) (judgment "must under all circumstances" be satisfied out of state treasury).

In *Lake Country Estates*, the Supreme Court emphasized the fact that the obligations of the entity at issue were not binding on the states which created the entity. *Lake Country Estates*, 440 U.S. at 402. The question of whether a judg-

ment against a particular entity must ultimately be satisfied by the state is thus important.

Based on the foregoing analysis, we conclude that whether the judgment will be satisfied out of the state treasury is one of the more important considerations in determining whether the entity enjoys Eleventh Amendment immunity, but that the mere fact that the judgment would be paid by the state does not require the conclusion that the entity enjoys Eleventh Amendment immunity.

3

A fundamental aspect of the relationship between the state and an entity which is an arm of the state is the state's ability to control that entity. Courts must consider the degree to which the entity enjoys administrative and financial autonomy from the state. *See Mt. Healthy*, 429 U.S. at 280; *Lake Country Estates*, 440 U.S. at 402. With respect to administrative autonomy, considerations of particular importance include whether the state has retained a veto

power over the entity's rule-making authority or whether the entity must seek state approval with respect to entity policies and activities. *Ambus v. Granite Bd. of Educ.*, 995 F.2d 992, 995-96 (10th Cir. 1993); *McDonald v. Board of Miss. Levee Comm'rs*, 832 F.2d 901, 907 (5th Cir. 1987). In addition, some courts consider whether the state or a state official possesses power to appoint members of the entity's governing body, whether the entity must submit reports or updates to the state, and whether the state may audit the entity's finances. *Christy v. Pennsylvania Turnpike Comm'n*, 54 F.3d 1140, 1149 (3d Cir. 1995); *Ram Ditta v. Maryland Nat'l Capital Park & Planning*, 822 F.2d 456, 458 (4th Cir. 1987). The presence of these characteristics suggests that the state retains some oversight and responsibility with respect to the entity.

4

Many courts consider the legal powers of the entity -- such as whether the entity has the power to sue and be sued,

to enter into contracts, and to acquire and hold property, including the power of eminent domain -- to constitute a significant indicator of an entity's distinct political and corporate nature. *See Ambus v. Granite Bd. of Educ.*, 995 F.2d 992, 996 (10th Cir. 1993); *Puerto Rico Ports Auth. v. M/V Manhattan Prince*, 897 F.2d 1, 9-10 (1st Cir. 1990); *Urbano v. Board of Managers of N.J. State Prison*, 415 F.2d 247, 250-51 (3d Cir. 1969). State agencies often are authorized to exercise such powers in carrying out their assigned functions. While the lack of such powers may suggest that the subject entity is substantially dependent on state support and should be deemed an arm of the state, the possession of such powers does not compel the conclusion that the entity must be deemed a political subdivision of the state. *Fitchik v. New Jersey Transit Rail Operations*, 873 F.2d 655, 663 (3d Cir. 1989).

Some courts have emphasized considerations of whether the functions of the entity are proprietary or governmental in nature. *See Benning v. Board of Regents of Regency Univs.*, 928 F.2d 775, 777 (7th Cir. 1991); *Puerto Rico Ports Auth. v. M/V Manhattan Prince*, 897 F.2d 1, 9 (1st Cir. 1990); *Blake v. Kline*, 612 F.2d 718, 725 (3d Cir. 1979). The apparent rationale for consideration of this factor is that whereas political subdivisions traditionally engage in proprietary functions as a result of their corporate status, the state traditionally engages in governmental functions as a result of its status as sovereign. In our view, however, consideration of this factor stems from a misunderstanding not only of the nature of the relationship between the state and its political subdivisions, but the nature of the Eleventh Amendment arm of the state inquiry.

The municipal corporation has been described as an arm, agency, or instrumentality of the state because the

corporation exercises a portion of the state's sovereignty to regulate and administer the local and internal affairs of a particular community. 1 McQuillin, The Law of Municipal Corporations §§ 2.08, 2.08a (3d ed. 1987 & Supp. 1995), and cases cited therein. The state's purpose in creating such municipal corporations is "'to carry into effect some power which the state itself may, but cannot conveniently, exercise.'" *Id.* § 2.08 (quoting *People v. Chicago Transit Auth.*, 64 N.E.2d 4, 10 (Ill. 1945)). Despite this relationship between the state and municipal corporations, municipal corporations, such as cities, are not arms of the state for purposes of Eleventh Amendment immunity. *See Mt. Healthy*, 429 U.S. at 280 (determining whether an entity is more like a county or city than an arm of the state). Merely because the function of a particular entity is traditionally governmental in nature does not require the conclusion that the entity resembles an arm of the state rather than a city or county.

Some courts have emphasized considerations of whether the entity is established primarily to conduct matters of local or of statewide concern or is managed locally or by the state. *See McDonald v. Board of Miss. Levee Comm'rs*, 832 F.2d 901, 907-08 (5th Cir. 1987); *Ram Ditta v. Maryland Nat'l Capital Park & Planning Comm'n*, 822 F.2d 456, 459 (4th Cir. 1987). However, because every state enjoys great latitude in determining the manner in which the state will address particular issues, differentiating between statewide and local concerns often proves difficult. For example, land use may be characterized as a local concern traditionally managed by local governmental entities, but a state may elect to assume the management of certain aspects of land use in the pursuit of statewide policies. §§ 24-65-101 to -106, 10B C.R.S. (1988 & 1996 Supp.) (Colorado Land Use Act); §§ 24-65.1-101 to -502, 10B C.R.S. (1988 & 1996 Supp.) (Areas & Activities of State Interest).

In view of these authorities, we conclude that in determining whether a particular state-created entity should be deemed an arm of the state and thus immune from suit in state court pursuant to Eleventh Amendment principles, a court must at a minimum consider the intent of the legislature, the purpose of the entity, the degree of autonomy enjoyed by the entity, the nature and extent to which the entity's activities may be financed by state funds, and the extent to which the entity is authorized to raise revenues by means of tax levies and the issuance of bonds. It should be emphasized that in particular circumstances other factors may prove relevant to the ultimate determination.

III

A

A review of the history of the Authority and the fund it administers sheds light on the question of the status of the Authority for purposes of Eleventh Amendment analysis. In 1915, the General Assembly established the state compensation insurance fund from which employers could secure

compensation for injured employees or the dependents of killed employees by paying a premium into the fund. Ch. 179, sec. 20, 1915 Colo. Sess. Laws 515, 529. In 1987, the General Assembly established the state compensation insurance authority fund as a successor to the state compensation insurance fund. § 8-54-102, 3B C.R.S. (1986). The Colorado compensation insurance authority fund was created in 1990. § 8-45-101, 3B C.R.S. (1990 Supp.).

These funds share some common characteristics with each other. The statutory schemes creating the funds and specifying the administration thereof address such significant issues of statewide concern as the development of uniform standards for compensation of employees injured on the job and the necessity of requiring employees throughout the state to take steps to ensure that such injuries will be compensated by employers. These broad statewide purposes are not affected by issues of significance to particular county, municipal or other local constituencies.

The monies in each fund have been used to pay "losses sustained or liabilities incurred under the contracts or policies of insurance" issued to employers by the entity administering that fund. § 8-54-106, 3B C.R.S. (1986); § 8-54-102(4), 3B C.R.S. (1986); § 8-45-102(4), 3B C.R.S. (1990 Supp.). The entity charged with fixing the premium rate has been required to fix the lowest possible rate consistent with a solvent fund and the creation and maintenance of a reasonable surplus. Ch. 179, sec. 28, 1915 Colo. Sess. Laws 515, 533; § 8-54-109, 3B C.R.S. (1986); § 8-45-106, 3B C.R.S. (1990 Supp.). The state treasurer has been custodian of each fund. Ch. 179, sec. 66, 1915 Colo. Sess. Laws 515, 552; § 8-54-121, 3B C.R.S. (1986); § 8-45-118, 3B C.R.S. (1990 Supp.). However, the General Assembly has consistently provided that the state shall not be liable for payments chargeable to the funds beyond the amount in the funds. Ch. 179, sec. 20, 1915 Colo. Sess. Laws 515, 529; § 8-54-102(1), 3B C.R.S. (1986); § 8-45-102(1), 3B C.R.S. (1990 Supp.).

While the purpose of these successive funds has remained consistent, the manner of their administration has varied significantly. In 1985, the state compensation insurance fund was administered by the fund itself under the direction of a manager. § 8-54-102, 3 C.R.S. (1973). That fund was considered a division of the state department of labor and employment, and the executive director of that department appointed the manager and other fund personnel. §§ 8-54-101(1), -104(1), 3 C.R.S. (1973).

To assist the manager, the General Assembly created an advisory council consisting of thirteen members, one of whom was the commissioner of insurance and twelve of whom were appointed by the governor. § 8-54-103(1), 3 C.R.S. (1973). Of the twelve appointees, two were members of the General Assembly, eight were employers insured with the fund, and two were employees whose employers were insured with the fund. *Id.* That fund was subject to the regulatory authority of the industrial

commission, including the commission's authority to fix insurance rates. §§ 8-54-102(1), -105(1), 3 C.R.S. (1973).

On July 1, 1987, the General Assembly created the state compensation insurance authority fund, and monies from the predecessor fund were transferred to it. § 8-54-102(1), (4), 3B C.R.S. (1986). With respect to this newly created fund, the General Assembly included a provision that monies of the fund were not to be transferred or revert to the state general fund at the end of the fiscal year. § 8-54-102(5), 3B C.R.S. (1986).

Furthermore, the General Assembly transferred the duty of administration of this fund to the State Authority created on January 1, 1987. The statute creating the State Authority contained the following pertinent language:

> (1) There is hereby created the state compensation insurance authority which shall be a body corporate and a political subdivision of the state. The authority shall not be an agency of state government, nor shall it be subject to administrative direction by any state agency except as provided in this article, and *except for the purposes of the "Colorado Governmental Immunity Act"*, article 10 of title 24,

> C.R.S., and except for inclusion in the risk management fund and by the division of risk management as provided in part 15 of article 30 of title 24, C.R.S.

§ 8-54-102.5(1), 3B C.R.S. (1986) (emphasis added).

The powers of the State Authority were vested in a board of directors appointed by the governor with the consent of the senate. § 8-54-102.5(2), 3B C.R.S. (1986). The board consisted of five members, one of whom was the executive director of the department of labor and employment, three of whom were employers insured with the fund, and one of whom was either an employee whose employer was insured with the fund or an interested citizen. *Id.* The board was given power to appoint a manager of the fund, develop and approve an annual budget, establish general policies and procedures for the administration of the fund, promulgate rules and regulations that establish the basis by which employer premiums are determined, review and recommend legislation pertaining to workers' compensation, and fix the rates to be charged for compensation insurance.

§§ 8-54-102.5(5), -105, 3B C.R.S. (1986). The General Assembly abolished the advisory council which had assisted the manager of the predecessor fund. § 8-54-103(7), 3B C.R.S. (1986).

State Authority employees, in contrast to fund employees, were exempted from the state personnel system. § 8-54-102.5(9), 3B C.R.S. (1986). Furthermore, the fund manager was required to submit an annual report to the governor and joint budget committee of the General Assembly regarding the business operations, resources, and liabilities of the fund. § 8-54-104.5, 3B C.R.S. (1986).

On July 1, 1990, the General Assembly established the Colorado compensation insurance authority fund and created the Authority to administer such fund. Although the legislative provisions establishing this fund and creating the Authority are similar to the legislative provisions establishing the predecessor fund and creating the State Authority, there are certain differences. For example, while members of the board of the Authority are still appointed by the governor

with the consent of the senate, the executive director of the department of labor and employment is not a necessary member of the board. That board position is to be filled by a person "experienced in the management and operation of insurance companies." § 8-45-101(2)(a), 3B C.R.S. (1990 Supp.).

B

This review of the historical development of the Authority compels the conclusion that this entity is in effect a special purpose authority. A special purpose authority that functions independently from the state may be regarded as a governmental unit distinct from the state. *See* 1 McQuillin, The Law of Municipal Corporations § 2.29a (3d ed. 1987).

While the Authority in some respects appears to function autonomously, other factors indicate that it resembles a state agency more than a municipality. The Authority and the fund it administers are established to address significant issues of statewide policy concerning compensation of employees injured on the job.

The General Assembly has declared the Authority to be a corporate body and a political subdivision of the state. § 8-45-101(1), 3B C.R.S. (1990 Supp.). Legislative history suggests that the State Authority was created to ensure that it would be more responsive and efficient than one within the state governmental system and to avoid a perceived conflict of interest resulting from the relationship between the fund and other divisions of the department of labor and employment charged with administration of the workers' compensation laws. *See* Hearings on S.B. 22 Before the House Committee on Business Affairs and Labor, 55th Gen. Assembly, 2d Sess., Mar. 11, 1986, Audio Tape No. 86-16 (explanation of bill by House sponsor Representative Bryan). The Authority's liability is by statute limited to the extent of the assets of the fund, derived from premium payments rather than from the general fund. § 8-45-102(1), (4), 3B C.R.S. (1990 Supp.). These factors reflect a legislative intent to grant substantial autonomy to the Authority and to

insulate the state from fiscal responsibility for the Authority's conduct.[7]

However, consideration of other relevant factors compels the conclusion that for purposes of Eleventh Amendment analysis the Authority must be deemed an arm of the state. Several factors of the organization and operation of the Authority are subject to state control. The governor appoints the members of the Authority's board, with the consent of the senate. § 8-45-101(2)(a), 3B C.R.S (1990 Supp.). The fund administered by the Authority is audited annually and a report of the results of such audit must be submitted to the governor and the joint budget committee of the General Assembly. § 8-45-121, 3B C.R.S. (1990 Supp.). In

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[7]The following remarks by Representative Clifton A. Bryan, sponsor of the bill creating the State Authority, suggest that the State Authority was created with the very intent to transfer decision-making authority from the state to the policyholders themselves: "If [the policyholders] have a problem [with fund administration], they've got a problem with themselves; they don't have to come back and blame the state, the department of labor . . . the blame lays on them." Hearings on S.B. 22 Before the House Committee on Business Affairs and Labor, 55th Gen. Assembly, 2d Sess., Mar. 11, 1986, Audio Tape No. 86-16.

addition, as the court of appeals observed, the monies of the fund, though generated from premium payments made by policyholders, are held in trust and invested by the state treasurer. §§ 8-45-118 to -120, 3B C.R.S. (1990 Supp.); *Simon*, 903 P.2d at 1145.

It must also be observed that the General Assembly has classified the Authority as a state agency for purposes of the Colorado Governmental Immunity Act (the Immunity Act) and the risk management fund. *See* § 8-45-101(1), 3B C.R.S. (1990 Supp.). Although no statutory language expressly provides that the General Assembly would ultimately appropriate funds to pay judgments awarded against the Authority or the fund that cannot be satisfied from extant monies in the fund, the provisions requiring the state treasurer to invest the fund's assets and providing for annual legislative review of the activities of the fund and the Authority strongly suggest a legislative concern that the Authority's activities may ultimately impact the state

treasury. The express legislative declaration that the Authority is a state agency for purposes of the Immunity Act reinforces this perspective. If the Authority were not a state agency, it could not and need not be subject to the provisions of the Immunity Act. *Cf.* § 8-45-104(2)(a)(II), 3B C.R.S. (1990 Supp.) (statutory authorization of the Authority to sue or be sued should not be construed as a waiver of the protections of the Immunity Act or the Eleventh Amendment).

By establishing the Authority as a state agency for purposes of the Immunity Act, the General Assembly has in effect determined that the Authority is to be included within the ambit of the risk management fund created to pay judgments against the state or its officials or employees resulting from successful claims brought pursuant to the Immunity Act or arising under federal law. § 24-30-1501(1), 10A C.R.S. (1994 Supp.). The risk management fund is funded from general appropriations. § 24-30-1510(1), 10A C.R.S. (1988). It is thus arguable that a judgment in favor of Simon

against the Authority on his section 1983 claim ultimately may be satisfied from sums derived from the state treasury.

In *Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1994), the United States Supreme Court stated that when indicators of immunity point in different directions, courts should determine the issue of Eleventh Amendment immunity in light of the two underlying purposes of the Eleventh Amendment. *Id.* at 404. These purposes include due regard for a state's sovereign dignity and the prevention of federal court judgments that must be paid from the state treasury. *Id.* at 400, 404. In *Hess*, the Court determined that a suit against the Port Authority Trans-Hudson Corporation was not a threat to the dignity of New York or New Jersey because the parent entity, the Port Authority of New York and New Jersey, was created with the consent of Congress pursuant to the Interstate Compact Clause of the United States Constitution. *Id.* at 400-04.

While it is not certain that civil judgments against the Authority might ultimately be paid by the state treasury, it is certain that the General Assembly has elected to control such potential result by establishing the Authority as a state agency for purposes of the Immunity Act. This legislative determination reflects a legislative purpose to insulate the state treasury from claims such as those asserted by Simon, without regard to the merits of such claims -- precisely the type of legislative purpose contemplated by Eleventh Amendment principles. In view of this legislative purpose, as well as the oversight provisions included in the legislative scheme establishing the Authority and the fund, we conclude, as did the court of appeals, that the Authority is an arm of the state for purposes of Eleventh Amendment analysis and therefore is not subject to suit as a "person" for purposes of Simon's section 1983 claim.

V

For the foregoing reasons, we affirm the judgment of the court of appeals.

JUSTICE MULLARKEY dissents, and JUSTICE SCOTT and JUSTICE HOBBS join in the dissent.

JUSTICE SCOTT dissents.

JUSTICE MULLARKEY dissenting:

I respectfully dissent from the majority opinion holding that the Colorado Compensation Insurance Authority (Authority) is an arm of the state and not a person for purposes of 42 U.S.C. § 1983 claims. I agree with the majority that a proper analysis of this issue requires the consideration and balancing of numerous factors. In my view, however, the totality of the applicable factors in this case fails to support the majority's conclusion. Therefore, I would reverse the decision of the court of appeals and direct that court to remand the case to the district court with directions to allow the case to proceed.

I agree with the majority that the question of whether a state-created entity is an arm of the state and therefore not a person for purposes of section 1983 is a question of federal law. Maj. op. at 8. The majority opinion enumerates several factors which should be considered when making such

a determination, including: (1) the intent of the legislature; (2) the purpose of the entity; (3) the entity's degree of autonomy; (4) the nature and extent to which the entity's activities may be financed by state funds; and (5) the ability of the entity to raise revenues. Maj. op. at 22-23. Relying mostly on two factors, *i.e.*, the intent of the legislature and the entity's level of autonomy, the majority concludes that the Authority is an arm of the state. In my opinion, however, the majority misinterprets the intent of the legislature and inaccurately assesses the Authority's degree of autonomy from the state. Fairly balancing the applicable factors with respect to the status of the Authority leads me to conclude that the Authority is not an arm of the state and is a person for section 1983 purposes.

The majority places great weight on the fact that the General Assembly has included the Authority within the coverage of the Colorado Governmental Immunity Act (the Immunity Act) and the risk management fund. *See* § 8-45-

101(1), 3B C.R.S. (1990 Supp.). According to the majority, "[i]f the Authority were not a state agency, it could not and need not be subject to the provisions of the Immunity Act." Maj. op. at 30. I disagree. In my view, the majority reads words into the statute which are not stated and cannot be fairly implied.

The majority's reliance on the legislature's expression that the Authority is included in those acts fails to give due consideration to the fact that the General Assembly also expressly indicated that the Authority is not an agency of the state. The statute creating the Authority states in relevant part:

> There is hereby created the Colorado compensation insurance authority which shall be a *body corporate and a political subdivision of the state. The authority shall not be an agency of the state government,* nor shall it be subject to administrative direction by any state agency except as provided in this article, and except for the purposes of the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S., and except for inclusion in the risk management fund and by the division of risk management as provided in part 15 of article 30 of title 24, C.R.S.

§ 8-54-102.5(1), 3B C.R.S. (1990 Supp.) (emphasis added). On its face, then, the exception upon which the majority relies simply immunizes the Authority under state tort law. The express language of the statute, however, establishes that the Authority is not a state agency.

In my opinion, the applicability of the Immunity Act to the Authority cannot be dispositive with respect to whether the Authority is an arm of the state or a person for section 1983 actions because the protections of the Immunity Act are not limited to arms of the state. The Immunity Act protects cities and municipalities,[8] which the majority acknowledges are persons, and not arms of the state, for section 1983 purposes. Maj. op. at 6. *See also Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 (1978); *County of Adams v.*

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[8]The Colorado Governmental Immunity Act extends its protections to the state and its political subdivisions including "public entities." The statutory definition of public entity includes "the state, county, city and county, incorporated city or town, school district, special improvement district, and every other kind of district, agency, instrumentality or political subdivision of the state organized pursuant to law." § 24-10- 103(5), 10A C.R.S. (1988).

Hibbard, 918 P.2d 212, 216 (Colo. 1996). By including the Authority in the Immunity Act, the legislature may well have meant to treat the Authority like a city, which under *Monell* is a person subject to suit under 42 U.S.C. § 1983.

I also disagree with the majority's finding that the Authority is heavily controlled by the state. In reaching this conclusion, the majority apparently disregards factors that indicate the substantial autonomy enjoyed by the Authority. The General Assembly declared the Authority to be a corporate body. § 8-45-101(1), 3B C.R.S. (1990 Supp.). In this respect, the legislature has designated the Authority as a non-agency both in form and in substance. The authority has the power to sue and be sued and to enter into contracts. § 8-45-103(2), 3B C.R.S. (1990 Supp.). The revenue collected by the Authority is derived from premiums and not from state-imposed sales, use, property or income taxes. Also, the amount of liability that the Authority can incur is statutorily limited to the extent of assets of the fund

derived from premium payments. Maj. op. at 28; § 8-45-102(1), (4), 3B C.R.S. (1990 Supp.). The Authority's autonomy from the state is most clearly evidenced by the fact that the Authority's employees are exempted from the state personnel system. § 8-45-101(9), (10), 3B C.R.S. (1990 Supp.). *Cf.* Colo. Const. art. XII, § 13(2) (providing that, with certain exceptions not including the Authority, "[t]he personnel system of the state shall comprise all appointive public officers and employees of the state."). These factors indicate that the legislature intended the Authority to be self-sufficient and independent of the state itself.

The Authority essentially operates as a private insurance company. Employers pay premiums to the fund, the Authority receives and processes claims, and the Authority makes disbursements to claimants out of the fund. *See* §§ 8-45-115 to -118, 3B C.R.S. (1990 Supp.). The majority acknowledges that, in part, the Authority "was created to ensure that

it would be more responsive and efficient than one within the state governmental system." Maj. op. at 28. In my view, the legislature's expressed intent to grant the Authority autonomy and to insulate the state from fiscal responsibility for the Authority's conduct strongly supports the conclusion that the Authority should be treated like a city which is a "person" for section 1983 purposes.

Balancing all of the applicable factors articulated by the majority to determine whether the Authority is an arm of the state for section 1983 purposes is a close question. When the question is so difficult to resolve, the balance must tip in favor of finding that the Authority is not an arm of the state because the legislature could have easily embraced the Authority as part of the state if it so wished. Certainly, it gave no fair notice of intent to insulate the Authority from all section 1983 suits in state court. Rather, the legislature distanced the state from the Authority as much as possible.

In the past, our caselaw has protected the ability of litigants to bring suit against political subdivisions of the state

when the law has been unclear. For example, in *Bertrand v. Board of County Commissioners of Park County*, 872 P.2d 223 (Colo. 1994), we held that the Immunity Act was in derogation of common law and therefore must be strictly construed. Thus, unless immunity is clearly established, an entity is liable to suit. Similarly, under the facts of this case, sound public policy requires that any doubt be resolved in favor of allowing the section 1983 suit to proceed.

Therefore, I would hold that the Authority is a "person" for the purposes of a section 1983 claim, and I respectfully dissent from the majority opinion.

I am authorized to say that JUSTICE SCOTT and JUSTICE HOBBS join in this dissent.

Simon v. State Compensation Insurance Authority, No. 95SC304

JUSTICE SCOTT, dissenting:

I join in the dissent by Justice Mullarkey. While I join in both her analysis and result, I write separately to note that further support for her conclusion that the Colorado Compensation Insurance Authority (Authority) is not an arm of the state can be found in the plain language of the legislative enactment, reflecting the intent of the General Assembly. In addition, I add that, in my view, the Eleventh Amendment to the United States Constitution, by its very terms, creates a limit on the power of federal courts and that it is only the force of precedent that permits the embodiment of sovereign immunity through that amendment to our nation's original document.

I.

Section 8-54-102.5(1), 3B C.R.S. (1986), provides in pertinent part:

> (1) There is hereby created the state compensation insurance authority which shall be a *body corporate and a political subdivision of the state*.

(Emphasis added.) "Body corporate" and "political subdivision of the state" are well-established terms that denote entities such as counties or municipalities that are not arms of the state. *See City of Durango v. Durango Transp.*, 807 P.2d 1152, 1156 (Colo. 1991). The use of those terms in the statute, and the express conclusion that the Authority is a "body corporate" and a "political subdivision of the state" indicates entities that would not constitute an arm of the state. The Authority should therefore be considered a "person" under 42 U.S.C. § 1983.

Thus, under the plain language of the statute, I would find that the Authority is not now, nor was it ever intended to be, an arm of the state for purposes of Eleventh Amendment analysis. *See PDM Molding, Inc. v. Stanberg*, 898 P.2d 542, 545 (Colo. 1995) (we should give effect to the intent of the legislature by looking first to the statutory

language and giving words and phrases their commonly accepted meaning).

II.

The Eleventh Amendment, which became effective in 1798, simply provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. Clearly, the language of this provision does not expressly create state "immunity" as it is commonly understood and often repeated, but rather reflects a general concept of federal judicial power or jurisdiction. *See* Roland D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 2.12, at 145 (2d ed. 1992) ("The eleventh amendment acts as a bar to federal jurisdiction over state governments, as such, when they are sued by anyone other than the federal government or another state.").

Although the drafters of the Eleventh Amendment may have contemplated the doctrine of sovereign immunity,[1] the express terms of the amendment provide only for a jurisdictional bar to suits brought against state governments in the federal courts. Indeed, the amendment does not serve to exempt states completely from the restrictions of federal law; it merely states that some actions against them must be brought in state rather than in federal court.[2]

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[1]It is clear that many of the Founders viewed sovereign immunity of the states to be paramount. Alexander Hamilton stated:

> It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without [the Sovereign's] consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . ."

The Federalist No. 81, at 487-88 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[2]An examination of the source and history of the Eleventh Amendment reflects that it was a reaction to the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), an original action in the Supreme Court in which the Court deter-

Thus, in my view, the interpretation of this amendment by the courts as a granting of immunity has expanded the more useful literal application of its terms. *See* Laurence H. Tribe, *American Constitutional Law* § 3-25, at 175 (2nd ed. 1988) (noting that "the Supreme Court, in deciding eleventh amendment cases, has focused not on the language of the eleventh amendment, but on the concept of sovereign immunity"). For example, unlike the reference to "the judicial Power of the United States" in Article III of the Constitution, a power that can not be expanded by the consent of the parties to a lawsuit, *Louisville & N.R.R. v. Mottley*, 211 U.S. 149 (1908), the language of the Eleventh

---

mined it had jurisdiction and entered judgment in favor of a plaintiff citizen of another state against Georgia. Obviously, I must defer to more than one hundred years of precedent, including at least seventeen cases by "exceptionally strong Courts," and the acceptance of such views by "forty-nine Congresses," as well as a multitude of state legislatures, *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34-35 (1989) (Scalia, J., concurring and dissenting), which have understood the Eleventh Amendment as encompassing both jurisdiction and general concepts of immunity. While I use the term, I am of the view it is best applied in a limited sense.

Amendment has been interpreted to allow a suit if a state grants its consent, *Hans v. Louisiana*, 134 U.S. 1 (1890).[3]

While I am obliged to acknowledge this expansion of the scope of the amendment, I agree with Justice Brennan's statement that, "The original Constitution did not embody a principle of sovereign immunity as a limit on the federal judicial power. There is simply no reason to believe that the 11th amendment established such a broad principle for the first time." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 289-90 (1985) (Brennan, J., dissenting).

I therefore respectfully dissent from the majority opinion for the reasons set forth by Justice Mullarkey and for the reasons I have set forth here.

---

[3]Other decisions have similarly expanded the scope of the amendment to apply in other contexts not covered by the amendment's express language. For example, the Supreme Court has construed it as barring suits against a state by its own citizens, although the amendment does not so provide. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Hans v. Louisiana*, 134 U.S. 1 (1890). The amendment also applies to suits in admiralty as well as suits "in law or equity." *Florida Dep't of State v. treasure Salvors, Inc.*, 458 U.S. 670 (1982); *Ex parte New York*, 256 U.S. 490 (1911).

APPENDIX C

SUPREME COURT, STATE OF COLORADO
Case No. 95SC304
CERTIORARI TO THE COLORADO COURT OF APPEALS, 93CA2211
DISTRICT COURT, CITY AND COUNTY OF DENVER, 93CV1982

ORDER OF COURT

MARK SIMON, CHERYL SIMON, and MALACHAI SIMON,

Petitioner,

v.

THE STATE COMPENSATION INSURANCE AUTHORITY, THE STATE COMPENSATION INSURANCE FUND, and THE COLORADO COMPENSATION INSURANCE AUTHORITY,

Respondent.

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby is, GRANTED, and the Opinion dated January 13, 1997, is WITHDRAWN.

IT IS FURTHER ORDERED that the parties file simultaneous briefs on the issues herein on or before Monday, MARCH 24, 1997. If either party desires additional oral argument, a separate pleading requesting argument must be filed on or before March 24, 1997.

BY THE COURT, EN BANC, FEBRUARY 18, 1997.

cc:

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Anthony Kohler
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Patrick H. Stanford, Clerk
Colorado Court of Appeals

APPENDIX D

COLORADO COURT OF APPEALS December 15, 1994
No. 93CA2211

Mark Simon, Cheryl Simon, and Malachai Simon,

Plaintiffs-Appellants,

v.

The State Compensation Insurance Authority, The State Compensation Insurance Fund, and The Colorado Compensation Insurance Authority,

Defendants-Appellees.

Appeal from the District Court of
the City and County of Denver
Honorable Larry J. Naves, Judge
No. 93CV1982

Division IV JUDGMENT AFFIRMED
Opinion by JUDGE ROTHENBERG
Marquez and Kapelke, J.J. concur

Plaintiffs, Mark Simon (Simon), Cheryl Simon, and Malachai Simon, appeal from the judgment of dismissal entered in favor of defendants, the State Compensation Insurance Authority (SCIA), the State Compensation Insurance Fund (SCIF), and the Colorado Compensation Insurance Authority (CCIA). We affirm.

According to plaintiffs' complaint, in 1982, Simon and his business partners applied for and received workers' compensation insurance with SCIF.

In 1984, Simon became the sole proprietor of the business and notified SCIF that he was the new insured. He paid premiums for workers' compensation insurance, up to and including January 1985.

In January 1985, Simon was injured during the course of his employment and required substantial medical care. He made a claim for insurance benefits with SCIF, which denied his claim on the basis that sole proprietors were not covered under the policy. Simon challenged the decision of the SCIF, and, following a hearing, the Administrative Law Judge (ALJ) found that Simon's injuries were covered under the policy.

On July 1, 1987, SCIA took over the operations of SCIF and became the responsible party for purposes of making payments under Simon's workers' compensation claim. SCIA disputed Simon's entitlement to temporary disability and medical benefits. He challenged the decision and, in an order dated July 12, 1989, the ALJ awarded Simon medical and temporary disability benefits. SCIA appealed both decisions to the Industrial Claims Appeals Panel, which affirmed the orders.

In April 1990, SCIA filed a general admission of liability regarding temporary/total disability. Simon objected to the admission of liability and filed a motion to reopen concerning the issue of any offsets to which SCIA may be entitled. Following a hearing, the ALJ again entered an order in favor of Simon which was affirmed on appeal.

In July 1990, CCIA assumed the obligations of SCIA. CCIA failed to make any payments to or on behalf of Simon

until September 1992. Meanwhile, Simon became involved in the legislative process relating to the workers' compensation laws.

Alleging that defendants had released private, confidential, and/or false information regarding him which resulted in damaged relationships between Simon and his wife and son, plaintiffs filed this action against defendants seeking damages for: (1) violation of constitutional rights under 42 U.S.C. §1983 (1988); (2) bad faith/breach of fiduciary duty; (3) outrageous conduct; (4) loss of consortium; (5) interference with familial relations; (6) invasion of privacy; and (7) violation of state and federal law. Plaintiffs provided notice of their claims as required by §24-10-109, C.R.S. (1994 Cum. Supp.).

Defendants filed a motion to dismiss, contending that plaintiffs' tort claims were barred by the Colorado Governmental Immunity Act (the Immunity Act) and that plaintiffs' claim under 42 U.S.C. §1983 (1988) also was barred because defendants were not "persons" within the meaning of the statute.

In response, plaintiffs claimed, *inter alia*, that the Immunity Act is unconstitutional and that defendants are persons within the meaning of §1983 because they are state corporations. The trial court granted defendants' motion to dismiss.

I.

Plaintiffs first argue that their tort claims are not barred by the Immunity Act because the statute itself is unconstitutional. Plaintiffs claim defendants should be subject to the same liability as any private insurance carrier, and to allow these defendants governmental immunity denies plaintiffs equal protection and violates

their rights to due process and access to the courts. We reject these contentions.

A statute is presumed to be constitutional, and the burden is on the party attacking the statute to establish its unconstitutionality beyond a reasonable doubt. *Dove v. Delgado*, 808 P.2d 1270 (Colo. 1991).

The Immunity Act provides that a public entity is immune from liability in all claims for injury which "lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant." It further provides that sovereign immunity is waived by a public entity in certain circumstances. *See* §24-10-106, C.R.S. (1988 Repl. Vol. 10A).

The CCIA was created by statute, namely §8-45-101(1), C.R.S. (1994 Cum. Supp.), which provides, in pertinent part:

> There is hereby created the Colorado compensation insurance authority which shall be a body corporate and a political subdivision of the state. *The authority shall not be an agency of state government*, nor shall it be subject to administrative direction by any state agency except as provided in this article, and *except for the purposes of the Colorado Governmental Immunity Act . . . and except for inclusion in the risk management fund and by the division of risk management* . . . (emphasis added)

A.
Equal Protection

Plaintiffs claim the Immunity Act denies them equal protection in that it allegedly denies them a fundamental right guaranteed by the Colorado Constitution, namely, the right of access to the courts to remedy injuries suffered. We do not agree.

Colo. Const. art. II, §6, states in relevant part that: "Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character . . . ." This provision simply provides that, if a right does accrue under the law, the courts will able to effectuate such right. *O'Quinn v. Walt Disney Productions, Inc.*, 177 Colo. 190, 493 P.2d 344 (1972). *See Allison v. Industrial Claim Appeals Office*, 884 P.2d 1113 (Colo. 1994) (certiorari review by court of appeals pursuant to §8-43-307, C.R.S. (1994 Cum. Supp.) denies workers' compensation claimants the right of access to the courts).

Equal protection of the laws requires that the government treat similarly situated persons in a similar manner. When governmental action is subjected to an equal protection challenge, the level of judicial scrutiny varies with the type of classification employed and the nature of the right affected. *Tassian v. People*, 731 P.2d 672 (Colo. 1987).

An equal protection challenge to legislation requires application of one of three standards of review, depending on the circumstances in which the challenge arises.

If the statutory classification abrogates a fundamental right or establishes a suspect class, the court must apply a strict scrutiny standard of review. Under such a standard,

the state has the burden of establishing that the classification serves a compelling governmental interest and that the legislation is necessary for the accomplishment of such purpose. *See Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (*Evans I*) and *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) (*Evans II*) (Equal Protection Clause protects fundamental right to participate equally in the political process and state constitutional amendment which infringes on this right by "fencing out" an independently identifiable class of persons is subject to strict scrutiny).

An intermediate level of review is required if the classification affects a quasi-suspect class. *See Willer v. City of Thornton*, 817 P.2d 514 (Colo. 1991).

If the statutory classification does not infringe on a fundamental right or adversely affect a suspect or quasi-suspect class, a rational basis standard of review controls. Under such a standard, equal protection of the laws is satisfied if the statutory classification has a reasonable basis in fact and bears a reasonable relationship to a legitimate governmental interest. The party challenging the legislation must establish beyond a reasonable doubt that the statutory classification is unreasonable or, if reasonable, is unrelated to any legitimate governmental objective. *See Lee v. Colorado Department of Health*, 718 P.2d 221 (Colo. 1986).

Here, plaintiffs claim the Act infringes upon a fundamental right, namely, the right of access to the courts to remedy injuries suffered. However, the right of access to the courts has not been recognized as a fundamental right by our supreme court. *See State Farm Mutual Automobile Insurance Co. v. Broadnax*, 827 P.2d 531 (Colo. 1992) (court applied rational basis test in analyzing right of access to courts). In fact, the constitutional right to access

does not create a substantive right at all. It provides a procedural right to a judicial remedy whenever the General Assembly creates a substantive right under Colorado law. Thus, the "access right" guarantees access to the courts when an individual has a viable claim for relief. *In re Marriage of Hartley*, 886 P.2d 665 (Colo. 1994).

Further, in *Dove v. Delgado, supra*, our supreme court held that the right to recover damages in tort is not a fundamental right.

Since there is no fundamental right involved, nor a classification triggering an intermediate standard of review, the rational basis standard of review applies. *See Tassian v. People, supra*.

Applying such a standard, we conclude that the Act does not violate plaintiffs' right to equal protection. In the Immunity Act's declaration of policy, the General Assembly recognized that the doctrine of sovereign immunity is in some instances an inequitable doctrine, but stated "that unlimited liability could disrupt or make prohibitively expensive the provision of . . . essential public services and functions." The General Assembly also recognized that taxpayers would bear the fiscal burdens of unlimited liability and that limitations on liability are necessary to protect taxpayers against excessive fiscal burdens. Section 24-10-102, C.R.S. (1988 Repl. Vol. 10A). *See Jenks v. Sullivan*, 826 P.2d 825 (Colo. 1992).

In accordance with this declaration of policy, our supreme court has consistently held that the Immunity Act is constitutional and that classifications restricting recovery by various tort victims bear a rational relationship to the legitimate state interest of fiscal certainty. *State v. DeFoor*, 824 P.2d 783 (Colo. 1992) (limitations on dam-

ages for the state's liability are rationally related to the legitimate state interests of fiscal solvency and providing essential services while minimizing taxpayer burdens); *Lee v. Colorado Department of Health, supra* (recovery limitations in Immunity Act are reasonably related to the governmental objective of providing fiscal certainty in carrying out the manifold responsibilities of government).

Here, the General Assembly specifically included the CCIA within the provisions of the Act, thereby conferring upon the CCIA sovereign immunity for all tort claims brought against it, unless the claim falls within one of the exceptions enumerated in the Act. The General Assembly also included the CCIA in the risk management fund and provided that judgments against the CCIA are to be paid from that fund. Sections 8-45-101, et seq., C.R.S. (1994 Cum. Supp.) & 24-10-1510, C.R.S. (1988 Repl. Vol. 10A). In doing so, the General Assembly protected the CCIA from unforeseen and unlimited tort judgments that could potentially have adverse effects on the risk management fund.

Because the provisions of the Act giving the CCIA sovereign immunity from tort claims are rationally related to the legitimate state interest of fiscal certainty, we reject plaintiffs' claim that the Immunity Act denies them equal protection.

Similarly, we reject plaintiffs' contention that the Immunity Act denies them equal protection because it creates an arbitrary classification in which the defendants are immune from tort liability, but private insurance companies may be held liable for injuries which lie in tort. *See Lee v. Colorado Department of Health, supra* (court rejected claim that the Immunity Act's recovery limitations violate equal protection by effectuating an arbitrary classification between public entities with limited liability

and private tortfeasors responsible for all harms caused by their negligence).

B.
Due Process

Plaintiffs next claim they have a property right to damages for their injuries that cannot be taken away without due process of law. We reject this contention.

The due process guarantee of the Colorado Constitution set out in Colo. Const. art II, §25 is applicable to rights, not remedies. *State v. DeFoor, supra.* In order to meet a challenge against the Immunity Act based on due process, the state only need show that the challenged provision is rationally related to a legitimate state purpose. *See Colorado Society of Community & Institutional Psychologists, Inc. v. Lamm*, 741 P.2d 707 (Colo. 1987).

A resident of a state has no constitutional right to sue the state or its political subdivisions. However, the state may permit a resident to bring an action against the state, and the state has the full authority to specify what actions may be brought against it and its subdivisions. The right to maintain an action against a governmental entity is derived from statutes. *See Fritz v. Regents of University of Colorado*, 196 Colo. 335, 586 P.2d 23 (1978).

Here, the General Assembly specifically included the CCIA within the sovereign immunity protections of the Act, thereby barring plaintiffs from bringing a tort claim against CCIA. As previously determined, this grant of sovereign immunity bears a rational relationship to the legitimate state interest of fiscal certainty. Thus, plaintiffs' contention that the Act violates their rights to due process is without merit.

II.

Finally, plaintiffs claim the trial court erred in finding that defendants are not "persons" within the meaning of 42 U.S.C. §1983 (1988), and in dismissing their §1983 claim. Again, we disagree.

To state a claim actionable under 42 U.S.C. §1983, plaintiffs must allege facts demonstrating that: (1) a person has deprived them of a right secured by the "Constitution and laws" of the United States and (2) the deprivation occurred "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." *See State v. DeFoor, supra.*

In *Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), the United States Supreme Court held that states, state officials sued in their official capacity, and governmental entities that are considered "arms of the State" are not "persons" within the meaning of §1983. Thus, such entities cannot be sued for monetary damages arising from alleged conduct which deprives a plaintiff of his or her civil liberties. However, they may be sued for prospective injunctive relief. *See Bannister v. Colorado Supreme Court Disciplinary Counsel*, 856 P.2d 79 (Colo. App. 1993); *National Camera, Inc. v. Sanchez*, 832 P.2d 960 (Colo. App. 1991).

In contrast, counties and municipal corporations are "persons" under §1983 and may be sued for damages. *See Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

Whether a governmental entity is an "arm of the state" is determined by balancing the entity's independent

powers with those entirely dependent on the state. If the entity is the state's alter ego, dependent entirely on the state for the funds and resources to respond to a suit for damages, it is equivalent to the state. *Wigger v. McKee*, 809 P.2d 999 (Colo. App. 1990).

By its terms set out above, §8-45-101 provides that the CCIA is a "body corporate and political subdivision of the state" but that, except for purposes of the Immunity Act and the risk management fund, it is not an agency of the state government.

Section 24-30-1510(3)(a), C.R.S. (1988 Repl. Vol. 10A) provides, *inter alia*, that expenditures are to be made out of the risk management fund to pay liability claims and expenses related thereto brought against the state, its officials, or its employees pursuant to the Immunity Act. And, because §8-45-101 specifically includes the CCIA in the Immunity Act and within the risk management fund, claims made against defendants are paid out of the risk management fund.

We therefore conclude that, because the CCIA is dependent on the state for funds and resources when responding to a suit for damages, it is an "arm of the state." *Wigger v. McKee*, *supra*. The same is true of each of its predecesors. Therefore, the trial court correctly concluded they are not "persons" within the meaning of 42 U.S.C. §1983.

In light of our conclusions above, we reject plaintiffs' final contention that the Immunity Act also is contrary to Colo. Const. art. V, §25, because defendants are "nothing more than an insurance company."

The judgment of dismissal is affirmed.

JUDGE MARQUEZ and JUDGE KAPELKE concur.

APPENDIX E

COLORADO COURT OF APPEALS December 15, 1994
No. 93CA2211

Mark Simon, Cheryl Simon, and Malachai Simon,

Plaintiffs-Appellants,

v.

The State Compensation Insurance Authority, The State Compensation Insurance Fund, and The Colorado Compensation Insurance Authority,

Defendants-Appellees.

Appeal from the District Court of
the City and County of Denver
Honorable Larry J. Naves, Judge
No. 93CV1982

Division IV JUDGMENT AFFIRMED
Opinion by JUDGE ROTHENBERG
Marquez and Kapelke, J.J. concur

Opinion Modified, and as Modified,
Petition for Rehearing *DENIED*

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* * *

. . . previously determined, this grant of sovereign immunity bears a rational relationship to the legitimate state interest of

fiscal certainty. Thus, plaintiffs' contention that the Act violates their rights to due process is without merit.

II.

Finally, plaintiffs claim the trial court erred in finding that defendants are not "persons" within the meaning of 42 U.S.C. §1983 (1988), and in dismissing their §1983 claim. Again, we disagree.

To state a claim actionable under 42 U.S.C. §1983, plaintiffs must allege facts demonstrating that: (1) a person has deprived them of a right secured by the "Constitution and laws" of the United States and (2) the deprivation occurred "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." *See State v. DeFoor, supra.*

In *Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), the United States Supreme Court held that states, state officials sued in their official capacity, and governmental entities that are considered "arms of the State" are not "persons" within the meaning of §1983. Thus, such entities cannot be sued for monetary damages arising from alleged conduct which deprives a plaintiff of his or her civil liberties. However, they may be sued for prospective injunctive relief. *See Bannister v. Colorado Supreme Court Disciplinary Counsel*, 856 P.2d 79 (Colo. App. 1993); *National Camera, Inc. v. Sanchez*, 832 P.2d 960 (Colo. App. 1991).

In contrast, counties and municipal corporations are "persons" under §1983 and may be sued for damages. *See Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

Whether a governmental entity is an "arm of the state" is determined by balancing the entity's independent powers with those entirely dependent on the state. If the entity is the state's alter ego, dependent entirely on the state for the funds and resources to respond to a suit for damages, it is equivalent to the state. *Wigger v. McKee*, 809 P.2d 999 (Colo. App. 1990). *See also Austin v. State Industrial Insurance System*, 939 F.2d 676, 678 (9th Cir. 1991) ("A central concern is whether a judgment against the entity named as a defendant would impact the state treasury.").

Here, plaintiffs assert that defendants are not an "arm of the state" because they are not dependent on the state for funds and because any monies due would come out of defendants' own funds.

As noted earlier, the CCIA is a hybrid entity. It is specifically designated as a political subdivision of the state and the CCIA board is appointed by the governor of Colorado with consent of the senate. Section 8-45-101, C.R.S. (1994 Cum. Supp.) It is audited annually by an auditor or auditing firm retained by the state auditor. And, the audit must be transmitted to the governor and the General Assembly. Section 8-45-121, C.R.S. (1994 Cum. Supp.).

Further, although the funds collected by CCIA consist of premiums, those funds are held in trust by the state treasurer who is responsible for investing the funds. Sections 8-45-118 and 8-45-120, C.R.S. (1994 Cum. Supp.).

CCIA is not an agency of the state government for most purposes, but it is a state agency in two important respects: for purposes of the Immunity Act and the risk management fund. Section 8-45-101, C.R.S. (1994 Cum. Supp.). *See also* §24-30-1510(3)(a), C.R.S. (1988 Repl. Vol. 10A) (expenditures are to be made out of the risk management

fund to pay liability claims and expenses related thereto brought against the state, its officials, or its employees pursuant to the Immunity Act). And, because §8-45-101 specifically includes the CCIA in the Immunity Act and within the risk management fund, claims made against defendants are paid out of the risk management fund. Thus, claims against the CCIA could have an impact on the state treasury.

At least two courts have analyzed the status of hybrid state agencies analogous to CCIA and have rejected arguments similar to those made by plaintiffs here.

In *Esparza v. Valdez*, 862 F.2d 788 (10th Cir. 1988), cert. denied, 492 U.S. 905, 109 S.Ct. 3214, 106 L.Ed.2d 565 (1989), plaintiffs sought wrongfully withheld past unemployment benefits. There, as here, plaintiffs contended that the defendant could be sued because: (1) Colorado's employment compensation fund was a special, segregated fund that was separately financed; and (2) the state was insulated from liability for amounts exceeding the resources of the fund.

The United States Court of Appeals for the Tenth Circuit disagreed and held that their request was tantamount to a request for a damage award against the state. As such, the relief was barred by the Eleventh Amendment which, with few exceptions, prohibits federal courts from entertaining suits brought by a private party against a state. *See Dube v. State University of New York*, 900 F.2d 587 (2d Cir. 1990). In rejecting plaintiffs' argument, the court stated:

> [E]ven if we could find little or no fiscal impact on the state from plaintiffs' suits, the financial impact on the state does not appear to be the predominant factor . . . . [W]hen

> money damages are awarded against the state, the state as an entity is being subject to suit.
>
> . . . .
>
> *Thus, no matter what fund a judgment for past damages comes from, it is still a damage award against the state.*

Esparza v. Valdez, supra, 862 F.2d at 795 (emphasis added).

We recognize that the Eleventh Amendment does not apply to suits against the state brought in state court. Nevertheless, federal precedent is apt because a similar analysis is used in determining whether a plaintiff's allegation is against a "person" and therefore permitted, if other statutory criteria are met; or whether it is against the state or an arm of the state and, therefore, not a "person" for §1983 purposes. *See Wigger v. McKee, supra.*

Another instructive decision is *Austin v. State Industrial Insurance System, supra.* There, the United States Court of Appeals for the Ninth Circuit concluded that Nevada's State Industrial Insurance System (SIIS) was a "state agency" entitled to Eleventh Amendment immunity and, therefore, not a "person" for the purposes of §1983. It reached its conclusions by weighing many factors including these: (1) SIIS was subject to the control and review of the governor, the legislature, and other government agencies; (2) the governor of Nevada appoints the board of directors that supervises SIIS; (3) before each legislative session, the board of directors has to report to the governor and legislature about the operations of SIIS; (4) although the funds collected by SIIS consist of the premiums of policyholders and other private payments, those funds are held in trust by the state treasurer; (5) the Nevada Supreme Court had ruled SIIS is a state

agency as a matter of state law, *see Northern Nevada Ass'n of Injured Workers v. Nevada State Industrial Insurance System*, 107 Nev. 108, 807 P.2d 728 (1991); and (6) the state has ultimate responsibility for the state insurance fund.

The court stated:

> Taken together, these provisions impose responsibility on the state and its treasurer to assure the integrity and solvency of the Nevada state insurance fund.
>
> . . . .
>
> We cannot say that a monetary judgment against SIIS inevitably would have an impact on the state treasury. However, this disclaimer is not fatal to SIIS's claim of immunity. While a determination that a judgment would have an impact on the state treasury would lead ineluctably to the conclusion that SIIS is a state agency, the absence of such an impact does not necessarily preclude eleventh amendment immunity.

Austin v. State Industrial Insurance System, *supra*, 939 F.2d at 679.

Our statutory scheme also imposes responsibility on the state and its treasurer to assure the integrity and solvency of the CCIA and shares many of the characteristics of Nevada's state insurance fund. Thus, after weighing all relevant factors, we conclude that the CCIA is an "arm of the state." The same is true of each of its predecessors. *See Wigger v. McKee*, *supra*; *Austin v. State Industrial Insurance System*, *supra*. See also 1 M. Schwartz & J. Kirklin, *Section 1983 Litigation: Claims Defenses and Fees*, 8.10 (2d Ed. 1994 Cum. Supp. No. 1).

Contrary to the defendant's contention, we do not view the recent decision of *Denver Area Labor Federation, AFL-CIO v. Meyer*, ___ P.2d ___ (No. 94CA0319, March 9, 1995), as inconsistent with this conclusion.

There, the salient issue was whether CCIA's funds constituted "public monies" under §1-45-116(1)(a), C.R.S. (1994 Cum. Supp.) of the Campaign Reform Act. The court, relying upon binding state precedent, determined that such funds were not "public monies" within the meaning of that statute.

Here, however, the issue is whether the CCIA is a "person" or an "arm of the state" within the meaning of the federal civil rights act, 42 U.S.C. §1983.

In sum, we reject plaintiffs' contention that the CCIA is a "person" within the meaning of 42 U.S.C. §1983.

We also reject plaintiffs' related argument that the Immunity Act also is contrary to Colo. Const. art. V, §25, because defendants are "nothing more than an insurance company."

The judgment of dismissal is affirmed.

JUDGE MARQUEZ and JUDGE KAPELKE concur.

APPENDIX F

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Civil Action No. 93 CV 1982, Courtroom No. 8

ORDER

MARK SIMON, CHERYL SIMON, and MALACHAI SIMON,

Plaintiffs,

vs.

THE STATE COMPENSATION INSURANCE AUTHORITY, THE STATE COMPENSATION INSURANCE FUND, and THE COLORADO COMPENSATION INSURANCE AUTHORITY,

Defendants.

THE COURT, having considered the Defendant's **MOTION TO DISMISS** and **REPLY**, and the Plaintiffs' **RESPONSE** hereby **GRANTS** the Defendant's motion for the following reasons:

1. The Plaintiffs' second through eighth claims for relief are, or could be, tortious in nature, and are barred by the Colorado Governmental Immunity Act, (CGIA), C.R.S. § 24-10-101, et seq.

2. Plaintiff's claims for exemplary damages are barred by CGIA, C.R.S. § 24-10-114(4).

3. Application of the CGIA under the circumstances of this case does not violate equal protection of the law in contravention of the Fourteenth Amendment to the United States Constitution. Arguments advanced by the Plaintiffs have been considered and rejected by the Colorado Supreme Court on numberous occasions, as argued in detail by the Defendants in their reply brief. See Lee v. Colorado Department of Health, 718 P.2d 221 (Colo. 1986); State v. DeFoor, 824 P.2d 783 (Colo. 1992; Bloomer v. Boulder County, 799 P.2d 942 (Colo. 1990; Evans v. Board of County Comm'rs. 174, Colo. 97, 482 P.2d 968 (1971).

4. The Plaintiffs' claim based upon 42 U.S.C. § 1983 is dismissed because the defendants are not "persons" within the meaning of 42 U.S.C. § 1983. Here, the defendants are equivalent to the state. The defendants are dependant entirely on the state

for funds and resources to respond to a suit for damages - clearly an "arm of the state." Wigger v. McKee, 809 P.2d 999 (Colo. App. 1990). Will v. Michigan Department of State Police, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed 2d 45 (1989).

DATED this 27 day of September, 1993.

BY THE COURT:

/s/ Larry J. Naves
LARRY J. NAVES
District Court Judge

CC: George S. Meyer, Esq.
Leo T. Judd, Esq.

APPENDIX G

SUPREME COURT, STATE OF COLORADO
Case No. 95SC304
CERTIORARI TO THE COLORADO COURT OF APPEALS, 93CA2211
DISTRICT COURT, CITY AND COUNTY OF DENVER, 93CV1982

ORDER OF COURT

MARK SIMON, CHERYL SIMON, and MALACHAI SIMON,

Petitioner,

v.

THE STATE COMPENSATION INSURANCE AUTHORITY, THE STATE COMPENSATION INSURANCE FUND, and THE COLORADO COMPENSATION INSURANCE AUTHORITY,

Respondent.

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that the Opinion is modified, and as modified, said Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, NOVEMBER 10, 1997.
Chief Justice Vollack and Justice Kourlis would grant the petition.
Justice Scott does not participate.

cc:

Lee T. Judd
Anthony Kohler
ANDREW T. BRAKE, P.C.
777 E. Girard Ave., Suite 200
Englewood, CO 80110-2767

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Denver, CO 80202

Clerk of Denver District Court
City & County Bldg.
1437 Bannock St., Rm. 256
Denver, CO 80202

Patrick H. Stanford, Clerk
Colorado Court of Appeals

November 10, 1997

Case No. 95SC304

Simon v. State Compensation Insurance Authority

The opinion has been modified, and, as modified, the petition for rehearing is denied. Therefore, attached is the modified copy of page 4. Please substitute this page for the like page in the opinion announced on October 20, 1997.

Also attached is the redlined page indicating the changes that were made.

MAC V. DANFORD
Clerk of the Supreme Court

/s/ Valerie Keoster
Deputy Clerk

:vk
Attachments

ALJ and the Panel found that Simon's injuries were covered by the terms of the policy that was issued to Simon.

On July 1, 1987, the SCIF's responsibility for payments of claims pursuant to Simon's policy was assumed by the newly created SCIA. *See* § § 8-54-102, -102.5, 3B C.R.S. (1986). Although it had been determined that Simon's injury was covered by the policy, the SCIA disputed Simon's entitlement to temporary disability benefits or medical benefits. Simon sought administrative relief from the SCIA's determination, and an ALJ concluded that Simon was entitled to benefits. On appeal, the ALJ's ruling was affirmed by the Panel. The SCIA subsequently filed a general admission of liability regarding Simon's temporary and total disability and obtained an offset because Simon had settled his third party tort claim.

On July 1, 1989, the SCIA's responsibilities were assumed by the newly created CCIA. *See* § 8-45-101, 3B C.R.S. (1990). The CCIA failed to make any disability

payments to Simon until September of 1992. In addition, during this period of time Simon became involved in the legislative process relating to workers' compensation laws in Colorado. According to Simon, as a result of his involvement in the legislative process, the CCIA released ALJ and the Panel found that Simon's injuries were covered by the terms of the policy that was issued to Simon.

On July 1, 1987, the SCIF's responsibility for payments of claims pursuant to Simon's policy was assumed by the newly created SCIA. *See* § § 8-54-102, -102.5, 3B C.R.S. (1986). Although it had been determined that Simon's injury was covered by the policy, the SCIA disputed Simon's entitlement to temporary disability benefits or medical benefits. Simon sought administrative relief from the SCIA's determination, and an ALJ concluded that Simon was entitled to benefits. On appeal, the ALJ's ruling was affirmed by the Panel. The SCIA subsequently filed a general admission of liability regarding Simon's temporary and total disability and obtained but maintained that it was

~~entitled to~~ an offset because Simon had settled his with a third party tort claim. Simon objected and filed a motion to ~~reopen the proceeding to address the offset issue. Again, the~~ ALJ issued an order in Simon's favor which was later affirmed by ~~the Panel~~.

On July 1, 1989, the SCIA's responsibilities were assumed by the newly created CCIA. *See* § 8-45-101, 3B C.R.S. (1990). The CCIA failed to make any disability payments to Simon until September of 1992. In addition, during this period of time Simon became involved in the legislative process relating to workers' compensation laws in Colorado. According to Simon, as a result of his involvement in the legislative process, the CCIA released

APPENDIX H
STATUTES

8-45-101. Colorado compensation insurance authority - creation - powers and duties. (1) There is hereby created the Colorado compensation insurance authority which shall be a body corporate and a political subdivision of the state. The authority shall not be an agency of state government, nor shall it be subject to administrative direction by any state agency except as provided in this article, and except for the purposes of the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S., and except for inclusion in the risk management fund and by the department of personnel as provided in part 15 of article 30 of title 24, C.R.S.

(2) (a) Effective July 1, 1989, the powers of the authority shall be vested in the board of directors of the Colorado compensation insurance authority, which shall have seven members. The members of the board shall be appointed by the governor with the consent of the senate. Of the seven members, four shall be employers whose liability under articles 40 to 47 of this title is insured by the Colorado compensation insurance authority with one of such employers to be a farmer or rancher. Two of the seven members shall be employees of employers whose liability under articles 40 to 47 of this title is insured by the Colorado compensation insurance authority. One of the seven members shall be experienced in the management and operation of insurance companies as defined in section 10-1-102 (4), C.R.S. Such member shall not concurrently serve as an owner, a shareholder, an officer, an employee, an agent of or in any other capacity with any business which competes with the Colorado compensation insurance authority. Of the employer members appointed to the board, the employer member who is a farmer or rancher shall be appointed for a

term expiring January 1, 1993, one employer member shall be appointed for a term expiring January 1, 1992, one employer member shall be appointed for a term expiring January 1, 1991, and one employer member shall be appointed for a term expiring January 1, 1990. One of the employee members shall be appointed for a term expiring January 1, 1991, and the other employee member shall be appointed for a term expiring January 1, 1993. The member experienced in the management and operation of insurance companies shall be appointed for a term expiring January 1, 1992. Thereafter, the term of office for each such member shall be five years. The initial appointees may serve on a temporary basis if the senate is not in session when they are appointed until the senate is in session and is able to confirm such appointments. Vacancies on the board shall be filled by appointment of the governor for the remainder of any unexpired terms. The board shall elect a chairman annually from its membership.

(b) The six members of the board who were serving as of January 1, 1989, shall continue to serve until July 1, 1989. On or before July 1, 1989, the governor shall appoint, with the consent of the senate, seven persons who meet the qualifications specified in paragraph (a) of this subsection (2) to serve as the members of the board effective July 1, 1989.

(3) Members of the board, except for the executive director of the department of labor and employment, shall be compensated one hundred forty dollars per diem plus their actual and necessary expenses. Per diem compensation, not to exceed thirty days in any calendar year, shall be paid only when the board is transacting official business. Such per diem shall be paid out of the Colorado compensation insurance authority fund upon vouchers drawn by the manager in the same manner as the normal operating expenses of such fund are paid.

(4) On and after July 1, 1987, the powers, duties, and functions formerly exercised by the state compensation insurance fund may be exercised by the Colorado compensation insurance authority.

(5) The board shall:

(a) Appoint the manager of the Colorado compensation insurance authority fund who shall serve under contract and appoint, hire, or delegate the authority to hire such other staff as may be necessary to carry out the duties of the Colorado compensation insurance authority;

(b) Develop and approve an annual budget;

(c) Establish general policies and procedures for the operation and administration of the Colorado compensation insurance authority fund and matters in connection therewith;

(d) Promulgate reasonable rules and regulations pertaining to the operation of the Colorado compensation insurance authority fund;

(e) Promulgate rules that establish the basis by which employer premiums payable to the Colorado compensation insurance authority fund are determined. The board may establish different rates for employers who meet the requirements established by the board for any classification after complying with the requirements of part 4 of article 4 of title 10, C.R.S., so long as those rates are not excessive, inadequate, or unfairly discriminatory.

(e.5) Offer to provide workers' compensation insurance and employer's liability insurance covering any liability of Colorado employers on account of personal injuries sustained by, or the death of, any employee. The board shall not refuse to insure any Colorado employer or cancel any

insurance policy due to the risk of loss, except as otherwise provided in this title.

(f) Review and streamline administrative procedures;

(g) Oversee the operations and make necessary personnel changes;

(h) Review the investigative procedures and implement changes to expedite investigations;

(i) Review and recommend legislation pertaining to workers' compensation in articles 40 to 47 of this title and to clarify legal concepts related thereto;

(j) Review the method of calculation of the experience modification factor with the object of providing maximum incentives for job safety and submit recommendations to the board for consideration in setting and approving rates; and

(k) Establish general policies and procedures by rule and regulation concerning medical care cost containment practices under articles 40 to 47 of this title.

(6) Article 4 of title 24, C.R.S., shall not apply to the promulgation of any policies, procedures, and rules and regulations authorized by subsection (5) of this section.

(7) (a) The board is authorized to contract with the department of labor and employment through the state personnel board pursuant to section 13 (4) of article XII of the state constitution for personnel to provide administrative support services, including, but not limited to, data processing. The board may also contract with the private sector.

(b) The board is authorized to contract with the department of labor and employment or the department of

personnel for information processing and administrative support services other than personnel for carrying out the functions authorized in this article.

(8) The board may expend reasonable amounts for the rent of quarters furnished by the department of labor and employment or from private sources for use in the administration of the Colorado compensation insurance authority fund.

(8.5) The Colorado compensation insurance authority may sell services, including but not limited to medical bill processing, which are developed pursuant to its powers under this article.

(9) Any person who was an employee of the division of the state compensation insurance fund on July 1, 1987, may elect on or after July 1, 1987, but before July 1, 1992, either to become an employee of the Colorado compensation insurance authority or to continue to remain an employee of the department of labor and employment. If such person elects to become an employee of the authority, such person shall be exempt from the state personnel system, and, if a member of the public employees' retirement association, such person may continue membership in the association with all attendant rights and duties. All other employees of the authority shall be exempt from the state personnel system but shall, by acceptance of employment, be subject to the provisions of article 51 of title 24, C.R.S. The authority shall provide for the deduction of employer and employee contributions from salary and for payment to the association of such deductions and for any other payments which would be due from a state employer.

(10) Any person who was an employee of the division of the state compensation insurance fund on July 1, 1987, and who does not become an employee of the Colorado

compensation insurance authority before July 1, 1992, shall continue to be within the state personnel system and shall continue to be an employee of the department of labor and employment if permitted under rules of the state personnel board. However, any employee who continues to perform duties or fulfill responsibilities for the benefit of the authority shall become an employee of the authority if that employee accepts a promotion, voluntary demotion, or transfer for purposes of a change of duties performed for the benefit of the authority. In such case, such person shall be exempt from the state personnel system, and, if such person is a member of the public employees' retirement association, such person may continue membership in the association with all attendant rights and duties. The authority shall provide for the deduction of employer and employee contributions from salary and for payment to the association of such deductions and for any other payments which would be due from a state employer.

(11) Notwithstanding any provision of law to the contrary, the claim files of injured employees, the policy files of employers, and all business records relating to the determination of rates that are not required to be disclosed by any other insurance company shall not be subject to the provisions of part 2 of article 72 of title 24, C.R.S.

(12) With respect to meetings of the Colorado compensation insurance authority, matters relating to the claim files of injured employees and policy files of employers shall not be subject to the provisions of part 4 of article 6 of title 24, C.R.S.

(13) The Colorado compensation insurance authority may enter into cooperative arrangements with any public or private entity for the purpose of carrying out its powers, duties, and functions. Nothing in this section shall require

or be interpreted to require an employer to provide health insurance coverage for its employees.

8-45-102. Colorado compensation insurance authority fund created - control of fund. (1) There is hereby created in the state treasury a fund, to be known as the Colorado compensation insurance authority fund, for the benefit of injured and the dependents of killed employees, which shall be administered in accordance with the provisions of this article by the board. Such administration shall be without liability on the part of the state, beyond the amount of said fund, constituted as provided in this article.

(2) The manager is vested with full power and jurisdiction over the administration of the Colorado compensation insurance authority fund and may appoint such subordinate officers as may be necessary for the efficient operation of the Colorado compensation insurance authority and may do and perform all things, whether specifically designated in this article or, in addition thereto, which are necessary or convenient in the exercise of any power or jurisdiction over said fund in the administration thereof under the provisions of this article as fully and completely as the head of a private insurance company might or could do, subject, however, to all the provisions of this article.

(3) Control of all moneys in the Colorado compensation insurance authority fund shall be transferred to the board, which shall administer the fund and use such moneys for the purposes of this article.

(4) The Colorado compensation insurance authority fund shall be a continuing fund and shall consist of all premiums received and paid into said fund for compensation insurance, all property and securities acquired by and through the use of moneys belonging to said fund, and all interest earned upon moneys belonging to said fund and

deposited or invested as provided in section 8-45-120. Said fund shall be applicable to the payment of the salaries of the employees of the fund and to its other operating expenses and to the payment of losses sustained or liabilities incurred under the contracts or policies of insurance issued by said Colorado compensation insurance authority fund in accordance with the provisions of articles 40 to 47 of this title. All moneys in the fund previously known as the state compensation insurance fund shall be transferred into the Colorado compensation insurance authority fund on July 1, 1987.

(5) The moneys in the Colorado compensation insurance authority fund shall be continuously available for the purposes of this article and shall not be transferred to or revert to the general fund of the state at the end of any fiscal year.

8-45-103. Board to fix rates - manager to administer rates - sue and be sued - contracts - care of injured. (1) The board shall have full power and it is its duty to fix and determine the rates to be charged by the Colorado compensation insurance authority fund for compensation insurance.

(2) The manager shall manage and conduct all business and affairs in relation to the rates to be charged by the Colorado compensation insurance authority fund for compensation insurance which shall be conducted in the name of the Colorado compensation insurance authority, and in that name, without any other name, title, or authority, the manager may:

(a) (I) Sue and be sued in all the courts of this state, or of any other state, or of the United States, and in actions arising out of any act, deed, matter, or thing made, omitted, entered into, done, or suffered in connection with the

Colorado compensation insurance authority fund and the administration, management, or conduct of the business or affairs relating thereto; and the manager shall be authorized to employ counsel to represent the fund in any action.

(II) Nothing in this paragraph (a) shall be construed to waive any provisions of the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S., nor shall it be construed to waive immunity of the state of Colorado from suit in federal court, guaranteed by the eleventh amendment to the constitution of the United States.

(b) Make and enter into contracts of insurance with employers as provided in this article, and such other contracts or obligations relating to the Colorado compensation insurance authority fund as are authorized or permitted under the provisions of articles 40 to 47 of this title; but the manager shall not, nor shall any officer or employee of the Colorado compensation insurance authority, or entities or parties with whom it contracts for services, be personally liable in a private capacity for or on account of any act done or omitted or contract or other obligation entered into or undertaken in an official capacity in good faith and without intent to defraud in connection with the administration, management, or conduct of the Colorado compensation insurance authority fund, its business, or other affairs relating thereto;

(c) Contract with physicians, surgeons, and hospitals for medical and surgical treatment, services and supplies, crutches and apparatus, and the care and nursing of injured persons entitled to benefits from said fund, and may contract for medical, surgical, hospital, and nursing services and supplies in excess of the amount and period otherwise limited in this article, if said manager may determine that the contracting of such extra medical, surgical, hospital, and nursing services and supplies might tend to reduce the period

of disability for which said fund would be liable for the payment and compensation.

8-45-104. Blanks furnished by state. The board shall prepare and furnish to employers at the expense of the fund all such blanks as may be necessary to carry out the terms and provisions of articles 40 to 47 of this title in connection with operation and maintenance of the Colorado compensation insurance authority fund.

8-45-105. Places of employment classified - amount of premiums. (1) The board may classify the places of employment of employers insured under the Colorado compensation insurance authority fund into classes in accordance with the nature of the business in which they are engaged and the probable hazard or risk of injury to their employees. It shall determine the amount of the premiums which such employers shall pay to said Colorado compensation insurance authority fund, and may prescribe in what manner such premiums shall be paid, and may change the amount thereof both in respect to any or all of such employers as circumstances may require, and the condition of their respective plants, establishments, or places of work in respect to the safety of their employees may justify. All such premiums shall be levied on a basis that shall be fair, equitable, and just as among such employers.

(2) In classifying the places of employment of an employer insured under the Colorado compensation insurance authority fund as provided in subsection (1) of this section, if the performance of a particular task or operation by an employee or by employees is unusual or incidental to the overall operation of the employer, such performance shall not materially change the classification to a higher risk classification. If the employer receives a gross income of less than seven thousand five hundred dollars as a result of the performance of a particular task or operation that is

secondary to the overall operation of the employer or if the percentage of time that an employee spends performing a particular task or operation constitutes five percent or less of the total overall hourly work performed annually by such employee, it shall be deemed to be unusual or incidental for the purposes of this subsection (2).

8-45-106. Insurance at cost - board may impose surcharges. (1) It is the duty of the board, in the exercise of the powers and discretion conferred upon it by articles 40 to 47 of this title, ultimately to fix and maintain, for each class of occupation, the lowest possible rates of premium consistent with the maintenance of a solvent Colorado compensation insurance authority fund, and the creation and maintenance of a reasonable surplus after the payment of legitimate claims for injury and death, that may be authorized to be paid from the Colorado compensation insurance authority fund for the benefit of injured and dependents of killed employees.

(2) The board may impose a premium surcharge, not to exceed an additional fifty percent, for up to twelve continuous months, as a condition precedent to insure or reinsure an employer whose policy was canceled or terminated by any insurer for reasons of fraud or intentional misrepresentation of a material fact; except that, if an employer disputes the imposition of such surcharge, the employer may make a complaint to the commissioner of insurance. If the commissioner of insurance determines that the board, in imposing a premium surcharge, has engaged in any conduct in violation of part 11 of article 3 of title 10, C.R.S., the commissioner may take any action the commissioner deems appropriate and authorized by law.

8-45-107. Basis of rates - reserve - surplus. (1) Such rates shall take no account of the extent to which the employees in any particular establishment have or have not

persons dependent upon them for support; nor of whether such employees have dependents who are nonresidents of the United States; nor of whether such employees are married or single; nor the age of any such employees.

(2) The rates so made shall be that percentage of the payroll of any employer which, on the average, shall produce a sufficient sum to:

(a) Carry all claims to maturity such that the rates shall be based upon the reserve and not upon the assessment plan;

(b) Produce a reasonable surplus as provided in articles 40 to 47 of this title, and to cover the catastrophe hazard, and to insure the payment to employees and their dependents of the compensation provided in said articles.

(3) In determining the amount of reserve to be laid aside to meet deferred payments according to awards, such reserve shall be ascertained by finding the present worth of such deferred medical and indemnity payments calculated at a rate of interest not higher than six percent per annum and such calculations of disability indemnity benefits shall be made according to a table of mortality not lower than the American experience table of mortality and, in the discretion of the board, by such other and further methods as will result in the establishment of adequate reserves.

8-45-108. Intentional misrepresentation by employer. (Repealed)

8-45-109. Rate schedules posted. The board shall cause to be prepared proper schedules showing the classification, rates, and regulations which shall be effective at such time as it may order. Said classification, rates, and regulations shall be published by posting a copy thereof on

the bulletin board in the offices of the Colorado compensation insurance authority.

8-45-110. Board to keep accounts - readjustment by board of rates. The board shall keep an accurate account of the money paid in premiums by each of the several classes of occupations or industries and the disbursements on account of injuries and death of employees thereof. It shall also keep an account of the money received from each individual employer and the amount disbursed from the Colorado compensation insurance authority fund on account of injuries and death of the employees of such employer. The Colorado compensation insurance authority fund, including such portions of said fund as may be derived from premiums paid by the state and its political subdivisions, shall be one fund indivisible. It is the intention that the amounts raised for such Colorado compensation insurance authority fund shall ultimately become neither more nor less than to make said fund self-supporting, and the premiums or rates levied for such purpose shall be subject to readjustment from time to time by the board as may become necessary.

8-45-111. Portions of premiums paid carried to surplus. The board shall set aside such proportion as it may deem necessary of the earned premiums paid into the Colorado compensation insurance authority fund, as a contribution to the surplus of the fund. No later than January 1, 2001, the board shall submit a plan for approval by the commissioner of insurance for the attainment of a reasonable surplus as determined in accordance with section 10-3-201, C.R.S., or, such surplus as approved by the commissioner of insurance.

8-45-112. Amendment of rates - distribution to policyholders. The board may amend at any time the rates for any class. No contract of insurance between the Colorado compensation insurance authority and any employer shall be

in effect until a policy or binder has been actually issued by the board and the premium therefor paid as and when required by this article. After the inspection of the premises of any employer, or after considering the experience of such employer, the manager may quote with respect to such employer's risk a rate higher or lower than that indicated by the manual issued by the board as applicable to the employer's risk. Any such decision of the manager shall be subject to review by the board. Not less often than once a year the manager shall tabulate the earned premiums paid by policyholders of the Colorado compensation insurance authority fund. Should the experience of the fund show a credit balance and after payment of all amounts which have fallen due because of operating expenses, injury, or death, and after setting aside proper reserves, the board shall distribute such credit balance to the policyholders who have a balance to their credit in proportion to the premium paid and losses incurred by each such policyholder during the preceding insurance period. In the event any such policyholder fails to renew a policy in the Colorado compensation insurance authority fund for the period following the period in which said dividends were earned, said policyholder shall be entitled to said credit dividend if such policy is terminated in good standing. In the event an employer actually discontinues business, said employer's policy shall be cancelled, and the dividend, if any, when ascertained, shall be returned to the employer.

8-45-113. Policy cancelled, when. (1) (a) Before cancelling a policy of coverage, the Colorado compensation insurance authority shall notify the employer for whom the authority issued the policy that the authority intends to cancel the policy. Such notice shall be sent by certified mail at least thirty days before the effective date of the cancellation of the policy, and the authority shall forward a copy of the notice to the division.

(b) Notice may be sent less than thirty days before the effective date of the cancellation of the policy if cancellation is based on one or more of the following:

(I) Fraud;

(II) Material misrepresentation;

(III) Failure to file a wage report; or

(IV) Nonpayment of deductible, advance premium, deposit premium, additional audited premium, premium due under a retrospective rating plan, or periodic premium.

(c) The Colorado compensation insurance authority shall not be required to issue a new policy of insurance to an employer until all moneys due the Colorado compensation insurance authority have been paid, all premiums have been paid on all cancelled policies, and the employer has complied with all provisions of the cancelled policy.

(2) (Deleted by amendment, L. 95, p. 63, 1, effective March 23, 1995.)

(3) If any employer fails to pay, in full, when due, any payment required to be made by said employer to the Colorado compensation insurance authority for any binder issued to the employer by said authority, such binder shall thereupon be cancelled immediately and without notice.

8-45-114. Adjustment of premiums. In the event the amount of premium collected by the fund from any employer at the beginning of any policy period, as ascertained and calculated by using the estimated expenditure of wages for the period of time covered by such premium payments as a basis, shall differ from the earned premium based upon the actual wage expenditure for such policy period, an

adjustment of the amount of such premium shall be made at the end of such policy period and the actual amount of such premium shall be determined in accordance with the amount of actual expenditure of wages for such period. In the event such actual wage expenditure for such period is less than the amount on which such estimated premium was collected, then such employer shall be entitled to have the amount of the difference in premium repaid or credited on succeeding premium payments. If the earned premium, where ascertained, exceeds in amount the premium so paid by such employer at the beginning of each such policy period, such employer, upon being advised of the true amount of such premium due, shall forthwith pay to said Colorado compensation insurance authority fund an amount equal to the difference between the amount actually found to be due and the amount so paid by the employer at the beginning of said policy period.

8-45-115. Determination of premium - payment in advance - deductibles. (1) Each employer insured in the Colorado compensation insurance authority fund shall pay into the Colorado compensation insurance authority fund in advance the amount of premium determined and assessed against such employer for the ensuing period. The amount of the premium to be paid by such employer shall be determined in accordance with section 8-44-114. Payment shall be made within the time fixed by this article.

(2) Any employer of farm and ranch labor or any officer of an agricultural corporation insured in the Colorado compensation insurance authority fund may agree as a condition of the employer's policy to pay a certain amount not to exceed one thousand dollars per claim toward the total amount of any claim payable under articles 40 to 47 of this title. The amount of premium to be paid by an employer who agrees to pay such a deductible shall be reduced based upon such deductible and shall be determined by the

manager in accordance with the rules and rates made and published by the board. The existence of a policy with a deductible or the fact of payment as a result of a deductible shall not affect the requirement of an employer to report an injury or death to the division as required in section 8-43-103 (1).

8-45-116. Reinsurance. The manager may secure reinsurance covering the catastrophe hazard with respect to any risks carried by the Colorado compensation insurance authority fund, and the state treasurer or the manager shall pay the premium for such reinsurance from the Colorado compensation insurance authority fund in the manner provided in section 8-45-118 for other disbursements from said fund.

8-45-117. Regulation by commissioner of insurance. (1) The Colorado compensation insurance authority shall be subject to regulation by the commissioner of insurance as provided in:

(a) Part 11 of article 3 of title 10, C.R.S., pertaining to unfair competition and deceptive practices;

(b) Part 4 of article 4 of title 10, C.R.S., pertaining to rate regulation; however, if the rates used by the Colorado compensation insurance authority are the national council on compensation insurance rates previously approved by the commissioner of insurance, the Colorado compensation insurance authority may use different rates for employers who meet the requirements established by the board of directors after complying with the requirements of part 4 of article 4 of title 10, C.R.S., concerning type II insurers.

(c) Sections 10-1-108 (8), 10-1-109, and 10-1-102, C.R.S., except (2) and (4); 10-1-205, C.R.S., (1) through (6) and (8); 10-3-109, C.R.S., except for the publication

requirements; 10-3-118, C.R.S.; 10-3-128, C.R.S.; 10-3-202, C.R.S.; 10-3-207, C.R.S.; 10-3-208, C.R.S. (1) and (2); 10-3-231, C.R.S.; 10-3-239, C.R.S.; 10-3-241, C.R.S.; 10-3-701, C.R.S.; and part 8 of article 3 of title 10, C.R.S., except as these sections are inconsistent with the provisions of this article.

(2) (Deleted by amendment, L. 97, p. 936, 5, effective May 21, 1997.)

(3) Nothing in this section shall be construed to subject the Colorado compensation insurance authority to any premium tax assessed pursuant to title 10, C.R.S.

(4) The cost of examinations performed in accordance with section 8-45-121 (4) shall be billed by the commissioner to the authority at prevailing hourly rates based upon time records kept by the commissioner. Any such payment received by the commissioner is hereby appropriated to the division of insurance in addition to any other funds appropriated for its normal operation.

(5) At such time as a reasonable surplus of the Colorado compensation insurance authority fund is reached pursuant to section 8-45-111 or when the Colorado compensation insurance authority fails to comply with the plan to attain a reasonable surplus as set forth in section 8-45-111, the Colorado compensation insurance authority shall be subject to regulation by the commissioner of insurance as provided in section 10-1-205 (7) and part 4 of article 3 of title 10, C.R.S., to the extent consistent with the provisions of this article.

8-45-118. Treasurer custodian of fund - disbursements. (1) The state treasurer shall be the custodian of the Colorado compensation insurance authority fund, and all disbursements therefrom shall be paid either by

the state treasurer upon warrants drawn in accordance with law upon vouchers issued by the board upon order of the manager, or by or under the direction of the manager in such other manner as the state treasurer may approve. In every case occurring in which a warrant has been drawn in accordance with law against the state treasurer upon vouchers issued by the board for payment of any sum of money from the Colorado compensation insurance authority fund, or when another form of payment has been made from such fund by or under the direction of the manager, and the time within which said warrant or other form of payment shall be presented for payment in order to be valid has not been stamped, printed, or written across the face thereof, or otherwise specified, and a period of six months has elapsed since the issuance of such warrant or other form of payment, during which no person entitled thereto, or the proceeds thereof, has presented the same to the state treasurer for payment, or appeared to claim the funds so authorized to be paid from the hands of the state treasurer or the manager, such warrant or other form of payment may in the discretion of the manager be posted for cancellation, and thereafter cancelled and set aside.

(2) In every such case in which it is proposed to cancel any such warrant, the manager shall cause a notice to be drawn in duplicate, with a description of said warrant containing the amount, number, date of issuance, and name of payee, and shall cause one copy of said notice to be posted in a conspicuous place which is open to the public in the office of said board and one copy to be delivered to the state treasurer. If, at the end of one month after the posting of such notice and the delivery of a copy to the state treasurer, such warrant is not presented for payment and no person entitled to the proceeds thereof appears to claim the funds so authorized to be paid in said warrant, said warrant may be cancelled as provided in this section.

(3) The state treasurer shall thereupon, upon the request of the manager, transfer any such funds held to the credit of or for the payment of such warrant back to the credit of the Colorado compensation insurance authority fund. If at any time thereafter application shall be made for the reissuance of such warrant, the same may be reissued, if the claim which it represents appears to be valid and still outstanding. Such reissued warrant shall be made payable from the moneys on deposit in the Colorado compensation insurance authority fund and shall be made payable to the person entitled to the proceeds thereof.

(4) The powers and discretion granted in this section to the
manager and the state treasurer shall obtain in all cases relating to the warrants or other forms of payment drawn on the Colorado compensation insurance authority fund, anything to the contrary in any statute notwithstanding.

8-45-119. State treasurer to give separate bond as custodian. (1) The state treasurer shall give a separate and additional bond in such amount as may be fixed by the board with sureties to be approved by the governor, conditioned for the faithful performance of the state treasurer's duties as custodian of the Colorado compensation insurance authority fund, and as custodian of all the bonds, warrants, investments, and moneys of, or belonging to, said Colorado compensation insurance authority fund, subject to all provisions of law governing bonds of the state treasurer. The premium on said bond shall be paid out of the earnings of the Colorado compensation insurance authority fund.

(2) The state treasurer shall give a separate and additional bond in such amount as may be fixed by the executive director of the department of labor and employment with sureties to be approved by the governor, conditioned for the faithful performance of the state

treasurer's duties as custodian of the funds under the jurisdiction of the director of the division of workers' compensation, and as custodian of all the bonds, warrants, investments, and moneys of, or belonging to, the funds under the jurisdiction of the director of the division of workers' compensation, subject to all provisions of law governing bonds of the state treasurer. The premium on said bond shall be paid out of the earnings of the funds under the jurisdiction of the director of the division of workers' compensation on a pro rata basis.

8-45-120. State treasurer to invest funds. (1) Except as provided in subsection (2) of this section, the state treasurer, after consulting with the board of directors or the board's designated committee as to the overall direction of the portfolio, shall invest any portion of the Colorado compensation insurance authority fund, including its surplus or reserves, which is not needed for immediate use. Such moneys may be invested in the types of investments authorized in sections 24-36-109, 24-36-112, and 24-36-113, C.R.S. Such moneys may also be invested in common and preferred stock in the same manner as a domestic insurance company pursuant to 10-3-226, C.R.S. The state treasurer shall determine the appropriate percentage of the fund, not to exceed one hundred percent of the surplus, to be invested in common and preferred stock and the appropriate level of risk for such investments. The state treasurer may make such investments in the form of mutual funds and may contract with private professional fund managers and employ portfolio managers.

(2) Subject to approval by the board, the manager may convey title to the real property known as the 950 Broadway Building, located at 950 Broadway, Denver, Colorado, and the adjoining property to the south, situated and known as lots six through eighteen, block one, first addition to Arlington Heights, and may also authorize and direct the

state treasurer to invest a portion of the funds in the Colorado compensation insurance authority fund for the purchase of real property, to house, contain, and maintain the offices and operational facilities of the authority as may be deemed necessary to accommodate its immediate and reasonably anticipated future needs. The manager is authorized to purchase such real property, buildings, and improvements thereon. Title to such real property, buildings, and improvements thereon shall vest in the Colorado compensation insurance authority, and such assets shall be a part of the Colorado compensation insurance authority fund. The manager may lease or rent space not needed for the immediate requirements of the authority in such real property to other public agencies or private businesses. Moneys received from such rental or lease of space and moneys appropriated by the general assembly for rental or lease of space in such real property shall be deposited with the state treasurer for credit to the Colorado compensation insurance authority fund. The manager shall not sell or otherwise dispose of any property, buildings, or improvements thereon so acquired, without consent of the board, and the moneys received from such sale or disposition shall be credited to the account of the Colorado compensation insurance authority fund. Expenses for administration, operation, and maintenance of such real property, buildings, and improvements thereon shall be paid by the state treasurer upon the direction and authorization of the manager, out of the funds of the Colorado compensation insurance authority fund, in an amount not to exceed the moneys received from such rental or lease of space and moneys authorized by the board. The executive director of the department of labor and employment shall transfer any interest in the real property known as the 950 Broadway Building, located at 950 Broadway, Denver, Colorado, and the adjoining property to the south, situated and known as lots six through eighteen, block one, first addition to

Arlington Heights, to the Colorado compensation insurance authority.

(3) Repealed.

8-45-121. Visitation of fund by commissioner of insurance - annual audit - examination. (1) The Colorado compensation insurance authority fund shall be open to visitation by the commissioner of insurance at all reasonable times, and the commissioner of insurance shall require from the manager reports as to the condition of such fund, as required by law to be made by other insurance carriers doing business in this state insofar as applicable to said fund.

(2) An annual audit of said fund shall be made by an auditor or firm of auditors, having the necessary specialized knowledge and experience, retained by the state auditor with the consultation and advice of the manager and the commissioner of insurance. The cost of such audit and examination shall be borne by the fund.

(3) The executive director of the department of labor and employment, with the consultation and advice of the manager and the commissioner of insurance, shall employ a qualified actuary or retain the services of a firm of actuaries of recognized standing who shall be free of any interest conflicting with the interests of the fund.

(4) At least once every three years, the commissioner of insurance shall conduct an examination of said fund, such examination to be conducted in the same manner as an examination of a private insurance carrier. With respect to such examination, the provisions of section 10-1-204, C.R.S., shall be applicable. The commissioner of insurance shall transmit a copy of the commissioner's examination to the governor, the state auditor, the general assembly, the

executive director of the department of labor and employment, and the manager.

8-45-122. Annual report. (Repealed)

8-45-123. Change of names - direction to revisor. The revisor of statutes is authorized to change all references to the state compensation insurance authority in the "Workers' Compensation Act of Colorado" and everywhere else a reference is contained in the Colorado Revised Statutes to the Colorado compensation insurance authority and to change all references to the state compensation insurance authority fund in the "Workers' Compensation Act of Colorado" and everywhere else a reference is contained in the Colorado Revised Statutes to the Colorado compensation insurance authority fund.

24-10-113. Payment of judgments. (1) A public entity or designated insurer shall pay any compromise, settlement, or final judgment in the manner provided in this section, and an action pursuant to the Colorado rules of civil procedure shall be an appropriate remedy to compel a public entity to perform an act required under this section.

(2) The state and the governing body of any other public entity shall pay, to the extent funds are available in the fiscal year in which it becomes final, any judgment out of any funds to the credit of the public entity that are available from any or all of the following:

(a) A self-insurance reserve fund;

(b) Funds that are unappropriated for any other purpose unless the use of such funds is restricted by law or contract to other purposes;

(c) Funds that are appropriated for the current fiscal year for the payment of such judgments and not previously encumbered.

(3) If a public entity is unable to pay a judgment during the fiscal year in which it becomes final because of lack of available funds, the public entity shall levy a tax, in a separate item to cover such judgment, sufficient to discharge such judgment in the next fiscal year or in the succeeding fiscal year if the budget of the public entity has been finally adopted for the fiscal year in which the judgment becomes final before such judgment becomes final; but in no event shall such annual levy for one or more judgments exceed a total of ten mills, exclusive of existing mill levies. The public entity shall continue to levy such tax, not to exceed a total annual levy of ten mills, exclusive of existing mill levies, but in no event less than ten mills if such judgment will not be discharged by a lesser levy, until such judgment is discharged. In the event that more than one judgment is unsatisfied and a ten-mill levy is insufficient to satisfy the judgments in one year, the proceeds of the ten-mill levy shall be prorated annually among the judgment creditors in the proportion that each outstanding judgment bears to the total judgments outstanding.

24-30-1501. Legislative declaration. (1) The general assembly recognizes that the general liability and automobile liability insurance policies of the state of Colorado have been cancelled, that no responsive bids were received, and that, as a direct result, the governor called an extraordinary session of the general assembly to address the need for a method to protect the state and its employees against claims brought under the "Colorado Governmental Immunity Act", article 10 of this title, and arising under federal law. The general assembly further recognizes that the consequences of uninsured liability of the state, including failure to respond to meritorious claims in a timely fashion and greater ultimate

costs of settlement caused by failure to investigate claims in an orderly and timely manner, are undesirable. The general assembly hereby declares, therefore, that the appropriate remedy is to create a reserve fund for purposes of self-insurance of the state. The general assembly declares that the purpose of this part 15 is to create a self-insurance fund, provide a mechanism for claims adjustment, investigation, and defense, and authorize the settlement and payment of claims and the payment of judgments rendered against the state. The general assembly also recognizes that no responsible bids have been received for property insurance policies for the state of Colorado and that a method for covering loss or damage to state property is needed. The general assembly hereby declares that the appropriate remedy is to create a reserve for purposes of self-insurance of the state for loss or damage to state property. The general assembly declares that its intent is to explore, on an annual basis, the availability of commercial liability insurance policies and property damage insurance policies, considering the possibility that the insurance industry can provide coverage in the future that is less expensive than the costs of operating a risk management system and paying for claims out of the risk management fund and out of the self-insured property fund.

(2) The general assembly recognizes that liability claims arising prior to September 15, 1985, exist for which no commercial insurance coverage is available. The general assembly hereby finds and declares that the risk management system will provide an appropriate remedy for such claims and that the department of personnel should be authorized to administer such claims.

* * *

24-30-1502. Definitions. As used in this part 15, unless the context otherwise requires:

* * *

(5) "State agency" means any principal department of the state, any state agency, institution, or hospital, any board, commission, advisory board, or other entity established by law within or as an advisory to any existing state department, institution, or agency, and any state-supported institution of higher education or other instrumentality thereof, except as provided in section 24-30-1517 (2), and the legislative and judicial departments of the state. The term also includes the Colorado state fair authority created pursuant to section 35-65-401, C.R.S., the Colorado compensation insurance authority, created pursuant to section 8-45-101, C.R.S., and any soil conservation district organized and certified pursuant to article 70 of title 35, C.R.S.; except that, in the case of soil conservation districts, such inclusion under the risk management fund is only for the purpose of liability protection as defined in subsection (4.3) of this section.

24-30-1510. Risk management fund - creation - authorized and unauthorized payments. (1) There is hereby created in the state treasury a fund to be known as the risk management fund, which shall consist of all moneys that may be appropriated thereto by the general assembly or that may be otherwise made available to it by the general assembly. Moneys "otherwise made available" shall be deemed to include transfers of moneys to the fund authorized in the general appropriation act. All interest earned from the investment of moneys in the risk management fund shall be credited to the risk management fund and become a part thereof. The moneys in the fund are hereby continuously appropriated for the purposes of the risk management fund other than the direct and indirect administrative costs of operating the risk management system. The general assembly shall make annual appropriations from the fund for the direct and indirect administrative costs of operating the

risk management system that are attributable to the operation of the risk management fund. At the end of any fiscal year, all unexpended and unencumbered moneys in the fund shall remain therein and shall not be credited or transferred to the general fund or any other fund.

(2) The risk management fund shall maintain reserves for incurred but unpaid claims, including general liability and automobile liability claims. The risk management fund shall maintain reserves to provide for the contingency that the reserves set aside in the fund to meet estimated expenses are inadequate to cover the actual expenses realized. The board after consultation with the executive director shall recommend the amount of money that is required to maintain adequate reserves. Adequate reserves shall be maintained in the risk management fund subject to available appropriations made by the general assembly in its discretion.

(3) Expenditures shall be made out of the risk management fund in accordance with subsection (1) of this section only for the following purposes:

(a) To pay liability claims and expenses related thereto, brought against the state, its officials, or its employees pursuant to the "Colorado Governmental Immunity Act", article 10 of this title, and claims against the state, its officials, or its employees arising under federal law, which the state is legally obligated to pay and which are compromised or settled pursuant to section 24-30-1515 or in which a final money judgment against the state has been entered;

(b) To pay the administrative costs of operating the risk management system and the costs of purchasing services pursuant to sections 24-30-1506, 24-30-1507, and 24-30-1513;

(c) To procure and pay premiums for one or more policies of insurance purchased pursuant to this part 15 to protect against all or any portion of the potential liabilities of the state of Colorado or of any state agency or its officers and employees;

(d) To pay any deductible or self-insured retention contained in any insurance policy purchased by or at the direction of the executive director;

(e) To pay liability claims and expenses related thereto when a state agency has contracted to defend and hold harmless the owner of property leased to the state agency for a state purpose if such contract limits the state's obligation to claims arising from alleged negligent acts or omissions of the state agency and of its public employees which occurred or are alleged to have occurred during the performance of their duties and within the scope of their employment, except where such acts or omissions are willful and wanton. Such claims shall be subject to the limitations of the "Colorado Governmental Immunity Act", article 10 of this title. No such contract shall be valid unless approved in writing by the executive director and meets the requirements of this paragraph (e).

(f) To make payments in accordance with the provisions of sections 24-30-1510.6 and 24-30-1510.7.

(4) Moneys in the risk management fund shall not be used to pay any of the following:

(a) Claims brought pursuant to the "Colorado Governmental Immunity Act", article 10 of this title, for which governmental immunity has not been waived pursuant to section 24-10-106;

(b) Claims which are actionable in contract except for claims relating to employment contracts and except for claims arising pursuant to paragraph (e) of subsection (3) of this section;

(c) Claims for liabilities or losses which are covered under commercial insurance policies purchased by the state;

(d) Expenses for complying with successful claims for injunctive relief;

(e) Any other claim or expense not set forth in subsection (3) of this section.

24-30-1515. Compromise or settlement of claims - authority. (1) A claim against the state or against a state official or employee whose defense has been assumed by the state may be compromised or settled on behalf of the state according to the requirements set forth in subsection (2) of this section. Prior to settling a claim of more than fifty thousand dollars, the board or the person authorized to settle the claim shall consult with the head of the affected state agency to assess the appropriateness of the proposed compromise or settlement amount. In settling a claim, the board or the person authorized to settle the claim may require the execution and presentation of those documents required by rule and regulation including those documents which discharge or hold harmless the state of all liability under the claim.

(2) (a) The following parties are authorized to make compromises or settlements on behalf of the state in the following amounts:

(I) A claims adjuster employed by the department of personnel or under contract with the department of personnel

is authorized to settle claims for an amount not to exceed five thousand dollars;

(II) The claims manager of the department of personnel is authorized to settle and direct payment in settlement of claims for an amount not to exceed twenty-five thousand dollars;

(III) The state risk manager is authorized to settle and direct payment in settlement of claims for an amount not to exceed fifty thousand dollars;

(IV) The executive director is authorized to settle and direct payment in settlement of claims for an amount not to exceed one hundred thousand dollars;

(V) The board is authorized to settle and direct payment in settlement of claims for an amount of one hundred thousand dollars or more but not to exceed the maximum liability limits under the "Colorado Governmental Immunity Act", as set forth in section 24-10-114.

(b) The board is authorized to settle and direct payments in settlement of claims brought under federal law.

(3) Disbursements from the risk management fund for claims compromised or settled in accordance with this part 15 shall be paid by the state treasurer upon warrants drawn in accordance with law upon vouchers issued by the department of personnel upon order of the board or person authorized in subsection (2) of this section to make such compromise or settlement.

(4) The provisions of the "State Administrative Procedure Act", article 4 of this title, shall not be applicable to the payment or settlement of claims pursuant to this part 15. Any person or party adversely affected or aggrieved in

compromising or settling a claim shall pursue such remedy in a district court of this state pursuant to the Colorado rules of civil procedure.

APPENDIX I

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Civil Action No. 93 CV 1982, Courtroom No. 8
'/s/Stamp

PLAINTIFF'S FIRST AMENDED COMPLAINT AND JURY DEMAND

MARK SIMON, CHERYL SIMON, and MALACHAI SIMON,

Plaintiffs,

vs.

THE STATE COMPENSATION INSURANCE AUTHORITY, THE STATE COMPENSATION INSURANCE FUND, AND THE COLORADO COMPENSATION INSURANCE AUTHORITY,

Defendants.

COMES NOW the Plaintiffs, Mark Simon, Cheryl Simon, and Malachai Simon, by and through their attorneys of record, Andrew T. Brake, P.C., and for their First Amended Complaint and Jury Demand against Defendants State Compensation Insurance Authority, State Compensation Insurance Fund and the Colorado Compensation Insurance Authority state and aver as follows:

1. This action is based upon 42 U.S.C. Section 1983 (hereinafter referred to as "Section 1983"), and upon the laws and legal precedent of the State of Colorado.

2. Defendant State Compensation Insurance Fund (hereinafter referred to as "SCIF") was, at certain relevant times, including specifically prior to July 1, 1987, an organization which provided Worker's Compensation Insurance to employers within the State of Colorado.

3. Defendant State Compensation Insurance Authority, (hereinafter referred to as "SCIA") was, at certain relevant times, including between July 1, 1987, and July 1, 1990, an organization which provided Worker's Compensation Insurance to employers within the State of Colorado.

4. Defendant Colorado Compensation Insurance Authority (hereinafter referred to as "CCIA") was, at certain relevant times, including after July 1, 1990 through the present, an organization which provided Worker's Compensation Insurance to employers within the State of Colorado.

5. Venue is proper in that the Defendants, at all times relevant, have existed within the State of Colorado and had offices within the City and County of Denver.

6. At all times relevant, Plaintiffs have been residents and citizens of the State of Colorado and living within the Counties of Adams and Eagle.

FACTS, TO ALL CAUSES OF ACTION

7. Plaintiff Mark Simon, along with his partners, applied for Workmen's Compensation insurance with SCIF during the year 1982.

8. Mr. Simon became a sole proprietor in or about 1984, and notified SCIF that he was the new insured, and the organization was entitled "Mark Simon d/b/a Rocky Mountain General."

9. Mr. Simon paid premiums for Workmen's Compensation insurance, including for himself, from 1984 forward, including specifically the premium for the month of January, 1985.

10. At all times relevant, Mr. Simon was the sole proprietor of Rocky Mountain General, which company had approximately six (6) employees at various times from 1984 forward.

11. On or about January 15, 1985, Mr. Simon, while performing duties on behalf of Rocky Mountain General, suffered a pelvic crush injury.

12. Mr. Simon made a claim for coverage with SCIF which claim was denied. Specifically, SCIF maintained that Mr. Simon, as a sole proprietor, was not subject to coverage under the terms of the policy.

13. Mr. Simon challenged the decision of SCIF and a hearing was held before Administrative Law Judge Edwin A. Felter, Jr., on or about January 11, 1988, with the sole issue to be determined being whether or not Mr. Simon was covered by Workmen's Compensation insurance on the date of his injuries.

14. In a decision dated November 8, 1988, Judge Felter determined that Mr. Simon's injuries were, in fact, covered by the Workman's Compensation Insurance Policy issued to Rocky Mountain General by SCIF.

15. On or about July 1, 1987, SCIA took over the operations of SCIF and was the responsible party for purposes of making payments under Mr. Simon's Workmen's Compensation claim.

16. After it was determined that the injury was, in fact, covered, SCIA disputed Mr. Simon's entitlement to temporary disability benefits and medical benefits.

17. In an Order dated July 12, 1989, Administrative Law Judge Felter awarded Mr. Simon medical and temporary disability payments. At that time, SCIA appealed both decisions to the Industrial Claims Appeals Panel. On or about March 5, 1990, both of the Administrative Law Judges' Orders were affirmed.

18. On or about April 5, 1990, SCIA filed a General Admission of Liability regarding temporary/total disability. On or about May 14, 1990, Mr. Simon, by and through counsel, objected to the admission of liability, and filed a Motion to Reopen relative to the issue of any offsets to which SCIA may be entitled.

19. On or about August 28, 1990, a hearing was held before Administrative Law Judge Felter on the issue of the offsets to which SCIA was entitled. The determination of the Administrative Law Judge was again in favor of Mr. Simon. Again, the decision was appealed, and again, the determinations on the appeal were in Mr. Simon's favor.

20. On or about July 1, 1990, CCIA replaced and otherwise assumed the obligations of SCIA.

21. Mr. Simon had also filed a third-party suit regarding his injuries seeking damages. The suit was settled in approximately September, 1988, with the approval of

SCIA. The suit and settlement thereof was improperly used as a basis for a claimed offset by SCIA relative thereto.

22. From the date of Mr. Simon's claim through September, 1992, the Defendant inexplicably refused to make any payments to Mr. Simon, despite their obligations and duties under the contract, as well as pursuant to the decisions of the Administrative Law Judge and the Industrial Claims Appeal Panel.

23. Additionally, Mr. Simon became involved in the legislative processes that relate to the Workmen's Compensation laws of the State of Colorado. As a result of Mr. Simon's involvement, the Defendant released private and confidential information and false information regarding Mr. Simon, contrary to the laws of the State of Colorado and of Federal law, including as advocated by said organizations in an attempt to discredit Mr. Simon and further deprive him of the benefits to which he was rightfully entitled.

24. As a result of the foregoing conduct, Mr. Simon's relationship with his wife, Plaintiff Cheryl Simon, and his son, Malachai Simon, have been severely damaged.

25. The conduct of the Defendants was attended by circumstances of malice or willful and wanton conduct, resulting in significant harm and damage to the Plaintiffs, including emotional harm and damge **[sic]**, and further entitled the Plaintiffs to recover exemplary damages in accordance with applicable law.

FIRST CLAIM FOR RELIEF
(Violation of Section 1983)

26. Plaintiff Mark Simon incorporates, by this reference, all other paragraphs as set forth in this Amended

Complaint, and makes said allegations a part hereof, as if fully set forth herein.

27. The Defendants are a political subdivision of the State of Colorado and acting under color of state law, wrongfully failed to pay benefits due and owing to Plaintiff Mark Simon under the Workmen's Compensation policy provided to his business, resulting in substantial injury and deprivation of his rights as secured by Federal law, including but not limited to, a violation of his Fourteenth Amendment rights to equal protection and/or due process of the laws,vis-a-vis deprivation of his property interests, all within the meaning of 42 U.S.C. Section 1983.

28. The Defendants, acting under color of Colorado State law, caused Plaintiff Mark Simon's Workmen's Compensation benefits to be wrongfully withheld, resulting in substantial injury and deprivation of Plaintiff Mark Simon's rights pursuant to the Workmen's Compensation statute.

29. The improper acts of the Defendants were done willfully and maliciously, with reckless disregard of Plaintiff Mark Simon's rights and entitlements.

30. Upon information and belief, the withholding of Workmen's Compensation benefits to which Plaintiff Mark Simon was entitled, including non-payment of his medical expenditures relating to his Workmen's Compensation claim constitutes acts of the State of Colorado in that employee(s) and/or agent(s) thereof acted in bad faith with regard to Plaintiff Mark Simon's Workmen's Compensation claim and were acting in their official capacity, had final authority to deny Plaintiff Mark Simon's Workmen's Compensation claims, as well as other wrongful conduct. Hence, they had final authority to make determinations concerning treatment of Plaintiff regarding his Workmen's Compensation benefits.

31. Plaintiff Mark Simon has suffered and continues to suffer emotional distress, consequential, general and special damages as a result of the wrongful acts and conduct perpetrated by Defendants as set forth in Plaintiff's Amended Complaint.

SECOND CLAIM FOR RELIEF
(Bad Faith/Breach of Fiduciary Duty)

32. Plaintiff Mark Simon incorporates, by this reference, all other paragraphs as set forth in this Amended Complaint, and makes said allegations a part hereof as if fully set forth herein.

33. At all times relevant, the Defendants, pursuant to Colorado law, had an express/implied duty to act fairly and in good faith in order not to deprive Plaintiff Mark Simon of his Workmen's Compensation benefits.

34. Defendants failed to properly perform their duties, obligations and responsibilities pursuant to Colorado law. Further, they acted in breach of their duty of good faith and fair dealing in wrongfully and unreasonably depriving Plaintiff Mark Simon of his Workmen's Compensation benefits, and in not paying therefor in a timely fashion, and in otherwise carrying on wrongful conduct as set forth in Plaintiff Mark Simon's Amended Complaint.

35. Defendants acted maliciously, willfully, wantonly, intentionally, and in bad faith, and in constant disregard of Plaintiff Mark Simon's rights and feelings.

36. Plaintiff Mark Simon has suffered and continues to suffer emotional distress, consequential, general and special damages as a result of the wrongful acts and conduct perpetrated by Defendants.

THIRD CLAIM FOR RELIEF
(Outrageous Conduct)

37. Plaintiffs incorporate, by this reference, all other paragraphs as set forth in this Amended Complaint, and makes said allegations a part hereof as if fully set forth herein.

38. Defendant's conduct toward Plaintiffs, as set forth in this Amended Complaint, including failing to pay medical compensation benefits, depriving Plaintiff Mark Simon of timely medical care, and in interfering with the familial relationship between the Plaintiffs constitutes outrageous conduct, and was willful and wanton.

39. Plaintiffs have incurred and suffered severe emotional distress as a direct and proximate result of the Defendants' conduct and actions.

40. The conduct of the Defendants is so outrageous and intolerable as to go beyond all possible bounds of decency.

41. Plaintiffs have suffered and continues to suffer consequential, general and special damages as a result of the wrongful acts and conduct perpetrated by Defendants.

FOURTH CLAIM FOR RELIEF
(Loss of Consortium)

42. Plaintiffs incorporate, by this reference, all other paragraphs as set forth in this Amended Complaint, and makes said allegations a part hereof as if fully set forth herein.

43. The Defendants had a duty to pay all sums due and owing under the terms and conditions of the insurance policy

taken out by Plaintiff Mark Simon. The Defendants failed to pay monies properly due and owing to Plaintiff Mark Simon, without any reasonable justification therefor, resulting in substantial emotional harm and damage, as well as delaying any physical recovery by Plaintiff Mark Simon due to his inability to pay for medical care.

44. Plaintiff Mark Simon and Plaintiff Cheryl Simon were married at the time Plaintiff Mark Simon incurred such injuries.

45. As a result of said injuries incurred by Plaintiff Mark Simon, Plaintiff Cheryl Simon also incurred a loss of her rights of consortium. Plaintiff Cheryl Simon has suffered harm and damage as the result of the Defendants' conduct.

FIFTH CLAIM FOR RELIEF
(Interference with Familial Relations)

46. Plaintiffs incorporate, by this reference, all other paragraphs as set forth in this Amended Complaint, and makes said allegations a part hereof as if fully set forth herein.

47. Defendants published or caused to be published confidential statements about the Plaintiff Mark Simon, and further improperly delayed the provision of benefits as required contractually and by Order of Court, thereby resulting in and otherwise causing substantial emotional harm and damage to Plaintiff Mark Simon.

48. As a result of the emotional harm and damage suffered and the effects thereof on Plaintiff Mark Simon, Plaintiffs Cheryl Simon, Malachai Simon and Mark Simon have suffered harm and damage to their familial relations.

SIXTH CLAIM FOR RELIEF
(Invasion of Privacy)

49. Plaintiff Mark Simon incorporates, by this reference, all other paragraphs as set forth in this Amended Complaint, and makes said allegations a part hereof as if fully set forth herein.

50. Defendants published or caused to be published confidential and/or private information about Plaintiff Mark B. Simon, including false statements about Plaintiff Mark B. Simon. The referenced statements were false and placed Plaintiff Mark Simon in a false light.

51. The Defendants' conduct was done maliciously, willfully and wantonly.

52. Plaintiff Mark Simon has suffered harm and damage, including general, special and consequential damages as the result of the Defendants' conduct.

SEVENTH CLAIM FOR RELIEF
(Violation of State And Federal Law)

53. Plaintiff Mark Simon incorporates, by this reference, all other paragraphs as set forth in this Amended Complaint, and makes said allegations a part hereof as if fully set forth herein.

54. Defendants published or caused to be published false, confidential and/or private statements about Plaintiff Mark Simon in violation of Colorado State law and Federal law.

55. The Defendants' conduct was done maliciously, or willfully and wantonly.

56. Plaintiff Mark Simon has suffered harm and damage, including general, special and consequential damages as the result of the Defendants' violation of State and Federal law.

WHEREFORE, Plaintiffs Mark Simon, Cheryl Simon, and Malachai Simon respectfully pray that this Court enter judgment against the Defendants as follows:

A. For compensatory damages, past, present and future, in conformance to proof at trial;

B. For harm and damages, including emotional distress, general, consequential and. special damages suffered by Plaintiffs, past, present and future, including but not limited to harm and damage to Plaintiff Mark Simon's reputation, and other special damages to be proved at trial;

C. For costs, interest at the highest lawful rate, expert witness fees, and attorneys fees pursuant to applicable Colorado statutes;

D. For exemplary and punitive damages; and

E. For such other and further relief as this Court deems just and proper.

PLAINTIFF DEMANDS A TRIAL BY JURY ON ALL ISSUES SO TRIABLE.

DATED this 27th day of April, 1993.

Respectfully submitted,

ANDREW T. BRAKE, P.C.

By /s/ Lee T. Judd

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Supreme Court, U.S.
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No. 97-1302

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

STATE COMPENSATION INSURANCE AUTHORITY and COLORADO COMPENSATION INSURANCE AUTHORITY,
Petitioners,
vs.
MARK SIMON, CHERYL SIMON, and MALACHAI SIMON,
Respondents.

On Petition for Writ of Certiorari to
The Supreme Court of the State of Colorado

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

GALE A. NORTON*
Attorney General
MARTHA PHILLIPS ALLBRIGHT
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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

I. QUESTIONS PRESENTED BY CONDITIONAL CROSS-PETITIONER FOR REVIEW

1. Whether the Court of Appeals (and the Colorado Supreme Court in denying certiorari) erred in holding that Petitioners State Compensation Insurance Authority, State Compensation Insurance Fund and Colorado Compensation Insurance Authority (hereinafter referred to collectively as "CCIA") is a "public entity" thereby entitling it to governmental immunity?

2. Whether the Court of Appeals (and the Colorado Supreme Court in denying certiorari) erred in holding that Colo. Rev. Stat. § 8-45-101 (1997), which purportedly confers governmental immunity on CCIA, is constitutional?

3. Whether the Court of Appeals (and the Colorado Supreme Court in denying certiorari) erred in affirming the Trial Court's dismissal of Mr. Simon's invasion of privacy claim based upon federal law on the grounds that it was preempted by the Colorado Governmental Immunity Act (hereinafter "GIA")?

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No. 97-1302

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

STATE COMPENSATION INSURANCE AUTHORITY and COLORADO COMPENSATION INSURANCE AUTHORITY,
Petitioners,
vs.
MARK SIMON, CHERYL SIMON, and MALACHAI SIMON,
Respondents.

On Petition for Writ of Certiorari to
The Supreme Court of the State of Colorado

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

II. STATEMENT OF THE CASE

Mark Simon and other members of his family filed a lawsuit in April 1993, in a Colorado state district court against the Colorado Compensation Insurance Authority and two of its predecessor entities (these state compensation insurance authorities or funds will be referred to collectively as "CCIA"). (The Simons' amended complaint is set forth at App. I to CCIA's Petition.) The Simons alleged that Mr. Simon had purchased workers' compensation insurance from CCIA prior to his injury in January 1985 in the course and scope of his employment, but that CCIA improperly denied Mr. Simon's workers' compensation claim and forced him to engage in lengthy litigation before an administrative body to enforce his claim. The Simons also alleged that Mr.

Simon became involved in the legislative processes that related to Colorado workers' compensation law and that CCIA allegedly released private and false information regarding Mr. Simon in an attempt to discredit him as part of this legislative effort.

The Simons alleged in their first claim for relief that CCIA wrongfully failed to pay benefits due under Mr. Simon's workers' compensation insurance policy and committed other wrongful acts, resulting in a deprivation of rights secured by federal law, including a violation of the Fourteenth Amendment rights to equal protection and due process, entitled Simons to a damages remedy under 42 U.S.C. § 1983 ("§ 1983"). The amended complaint also included six state law-tort claims. The Seventh Claim asserted Defendants' "published" false confidential and/or private statements about Plaintiff Mark Simon in violation of Colorado Federal law.

CCIA, through the Colorado Attorney General, filed a motion to dismiss the amended complaint under Colo. R. . P. 12(b)(1) and (5) for lack of jurisdiction and a failure to state a claim upon which relief could be granted. On September 27, 1993, the Denver District Court granted the motion to dismiss. App. F. to CCIA's Petition. The District Court dismissed the claim under § 1983 because CCIA is not a "person" within the meaning of that statute. The district court also held that the six state law-tort claims, including Simon's privacy claim were barred by the Colorado GIA.

The decision of the District Court was affirmed by the Colorado Court of Appeals on December 15, 1994, in an original and a modified order. Appendices D and E to CCIA's Petition.

Contrary to plaintiffs' representation that all of the issues raised in their Conditional Cross Petition were presented to the Denver District Court and again at each stage of appeal, plaintiffs' third issue concerning Mr. Simon's privacy rights as a federal claim was only raised at the Colorado Supreme Court level. The decisions of the Denver District Court, Colorado Court of Appeals, and Colorado Supreme Court are set forth respectively as Appendices F, D and E, and A to CCIA's Petition for Writ of Certiorari. Simons' Response Brief to Defendants' Motion to Dismiss in the Denver District Court is set forth as Appendix A to this Brief. Simons' Opening and Reply Brief in the Colorado Court of Appeals are set forth as Appendices B and C. Various Colorado statutes referenced in this brief which are not included in App. H to CCIA's Petition are set forth in App. D to this Brief.

III. ARGUMENT IN OPPOSITION TO GRANTING CONDITIONAL CROSS WRIT

A. THE COLORADO COURT OF APPEALS CORRECTLY HELD THAT CCIA IS A PUBLIC ENTITY UNDER THE GIA, THE DECISION OF WHICH DOES NOT WARRANT REVIEW BY THIS COURT.

In its Petition for Certiorari, Petitioner CCIA seeks review of the Colorado Supreme Court's decision that it is not an "arm of the state" and therefore a person under 42 U.S.C. § 1983. That decision was based on the court's erroneous analysis of the decisions of this Court and federal appellate courts on what constitutes an arm of the state. Cross Petitioner now argues that the Colorado Courts did not go far enough; that they should have concluded that CCIA is not a "public entity" at all, but a private business. This

argument is not only without merit but in the context of Simons' argument is also not an issue appropriate for certiorari review.

Under Supreme Court Rule 10, a writ of certiorari will only be granted for compelling reasons. While not absolute, 10(b) suggests that such compelling reasons include when "a state court of last resort has decided an important federal question in conflict with the decision of another state court of last resort or of a United States court of appeals" and 10(c) also suggests as compelling when "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Simons do not articulate how the application of governmental immunity to CCIA as a public entity constitutes an important federal question. No United States Constitutional provisions, Amendments, or federal statutes are cited.

The only federal question context in which the Simon's argument would be appropriate for review by this Court is whether CCIA should be categorized as an "arm of the state" entitled to Eleventh Amendment immunity. Simon's citation of *Bank of United States v. Planter's Bank*, 22 U.S. **(9 Wheat.)** 904, 6 L. Ed. 244 (1824) raises the issue of a state's sovereignty under the Eleventh Amendment. Thus, Simons' Argument I is, in reality, further reason for granting Petitioner's Writ rather than the Cross Petition. However, as presented by the Simons, their argument is not appropriate for review by Writ of Certiorari.

Rather than presenting an important Federal question, the Simons essentially ask this court to review the Colorado Appellate Court's interpretation of a state statute which defines a "public entity" as follows:

> . . . the state, county, city and county, municipality [sic], school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdivision thereof organized pursuant to law and any separate entity created by intergovernmental contract or cooperation. . . .

Colo. Rev. Stat. § 24-10-103(5)(1887) (*see* App. D for full subsection). In addition to this definition, the state legislature also expressly provided that CCIA is a state agency for the purposes of the GIA and for inclusion in the risk management fund. Colo. Rev. Stat. § 8-45-101(1)(1997). As opposed to liability under the Workers' Compensation Act or CCIA's contracts thereunder, the legislature, by placing it under the state's risk management program, provided that CCIA's tort and federal liability judgments are to be satisfied through the risk management fund. Colo. Rev. Stat. § 24-30-1510(1)(1997). App. H, Petition for Certiorari. Contrary to Simons' statement at page 3 in their Brief In Opposition that "the risk management fund established under sec. 24-30-1510, C.R.S. . . . may not be considered as being a part of the state treasury," that statute states:

> There is hereby created in the state treasury a fund to be known as the risk management fund, which shall consist of all moneys that may be appropriated thereto by the general assembly or that may be otherwise made available to it by the general assembly.

Clearly, the moneys for the risk management fund are from the state treasury.

The case of *Bank of United States v. Planter's Bank*, *supra*, is also clearly distinguishable. In *Bank*, the State of Georgia had simply participated in the incorporation of the

Planter's Bank as a share holder. There was no public purpose served by Georgia's involvement. However, the CCIA is not simply a private insurance company provided special treatment by the State of Colorado. Historically, CCIA is an insurer of last resort, covering employers who could otherwise not be insured through private carriers. For example, certain common carrier drivers, excluded from the Workers' Compensation Act definition of employee, "shall be eligible and shall be offered workers' compensation insurance coverage by the Colorado Compensation Insurance Authority. . . ." Colo. Rev. Stat. § 8-40-301(5) and (6)(1997). It has been the policy of CCIA to provide workers' compensation insurance when no private carrier will. *Bastein v. Martinez*, 698 P.2d 1373 (Colo. App. 1984). *See*, 4 Larson, *Workmens' Compensation Law*, § 92.52 (1990). Only in very limited circumstances will CCIA reject an application for workers' compensation insurance. *Bastien v. Martinez*, 698 P.2d at 1374. CCIA is exposed to greater liability and risk than private insurance carriers which refuse to insure certain members of the public.

Even more significantly, unlike private insurers, CCIA is charged with the duty to provide workers' compensation insurance to the public at cost. Colo. Rev. Stat. § 8-45-106 (1997). Unlike private carriers, CCIA makes no profit on their premiums. CCIA also does not have the option of declaring bankruptcy. It must carry on its statutory mandate and responsibility to the public.

These provisions are clear and unambiguous. Both because of the public purpose and missio- of CCIA and because of the express language of the Colorado Legislature making CCIA a state agency and "public entity" under the GIA, there is no need to review the Colorado Appellate Courts' application of the GIA to Simons' claims against CCIA. The only consideration the Court should give this

issue is that it supports the granting of the writ sought in CCIA's Petition on the issue of whether CCIA is an "arm of the state" and not a "person" under 42 U.S.C. § 1983.

B. COLO. REV. STAT. § 8-45-101 IS CONSTITUTIONAL.

Petitioners cite no compelling reason for review by this Court of this issue. Again no conflicting federal cases are cited. Indeed, Simons rely only on Colorado Court precedents. Their argument that the statute denies them equal protection in violation of the Fourteenth Amendment to the United States Constitution is without merit.

It is unclear why Simons believe that strict scrutiny of this statute should apply. They do not explain this bald statement other than to cite the case of *Tassian v. People*, 731 P.2d 672 (Colo. 1987). Nothing in that decision sheds any light on application of the compelling government interest standard to the facts of this case. That test is reserved for suspect classifications and violation of fundamental constitutional rights. Even if one surmised that Simons' argument for strict scrutiny is that they were denied their day in court by application of the GIA, access to court in circumstances similar to these limitations has not been recognized as a fundamental right entitling one to the strictest level of review under any scenario similar to this case. *United States v. Kras*, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973) (filing fee for bankruptcy petition); *State v. DeFoor*, 824 P.2d 783 (Colo. 1992). The GIA does not infringe upon a fundamental right or create a classification based on race, religion, national origin or gender. *See Fritz v. Regents of University of Colorado*, 196 Colo. 335, 586 P.2d 23, 25 (1978).

The concept of access to court as a fundamental right has been limited to areas of special relationship such as

marriage and divorce. *United States v. Kras*, 409 U.S. 434, 444-445 (1973). Therefore, the GIA must be reviewed under the rational basis test. *Sigman v. Seafood Ltd. Partnership I*, 817 P.2d 527 (Colo. 1991).

Under the rational basis test, the court need only determine whether the classification bears a rational relationship to a permissible governmental purpose. *Vance v. Bradley*, 440 U.S. 93, 97 (1979). Simons' argument that they were denied equal protection because of the application of governmental immunity to the CCIA, of which private workers' compensation insurers are not entitled, is no more than to state that the GIA separates victims of private tort-feasors from victims of public tort-feasors. This argument has previously been rejected in Colorado, *State v. DeFoor*, 824 P.2d at 786 n.3. Simons do not identify any other state court of last resort or United States Court of Appeals which is in conflict with Colorado.

In the due process context, this Court has similarly held that liability limitations found in the Price - Anderson Act did not violate the due process guarantee in the Fourteenth Amendment. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 82 (1978).

As set forth above in Argument A, historically, CCIA is an insurer of last resort, covering employers who could otherwise not be insured through private carriers. It is charged with providing coverage at cost and must carry out the state's mandate where private insurers may abandon their insureds and declare bankruptcy. Thus, CCIA has been given the protection of the GIA, in order for the state to further the important state goal of assuring that all employees will have the protection of workers' compensation insurance.

The purpose of the GIA is to protect the state treasury so that it may accomplish the many needs of

government. Contrary, to Simons' statement at page 14 of their Cross Petition that judgments are to be paid out of the funds allocated to it under Colo. Rev. Stat. § 8-45-102(4), that section only makes the Colorado Compensation Fund (made up of premiums) available for the "payment of losses sustained and liabilities incurred under the contracts or policies of insurance." Thus, such funds are restricted and unavailable for payment of state tort or federal civil rights judgments. Colo. Rev. Stat. § 24-10-113 provides that a public entity shall pay a judgment from (a) funds available from a self-insurance fund; (b) funds not appropriated for any other purpose or unrestricted or (c) funds appropriated for the payment of such judgment which are not previously encumbered. Because, both by provisions in the statute creating CCIA § 8-45-101(1)(1997) and in the Risk Management Act Colo. Rev. Stat. § 24-30-1502(5)(1997), the Colorado Legislature has expressly designated CCIA as a state agency to participate in that self-insurance program payments of judgments against CCIA must be made from the state's self-insurance fund. Clearly, the CCIA needs the GIA protection because its general liability is under the risk management fund which is made up of appropriations by the state, itself. The risk management fund consists of all money which are appropriated or otherwise made available to it by the general assembly. Colo. Rev. Stat. § 24-30-1510 (1997).

These justifications provide a rational basis for the constitutionality of the GIA. There is no compelling reason for this Court to grant Simons' Petition on this issue.

C. THIS COURT SHOULD DENY PLAINTIFFS' CROSS- PETITION REGARDING THE DISMISSAL OF MR. SIMON'S INVASION OF PRIVACY CLAIM BASED ON FEDERAL LAW BECAUSE SIMONS FAILED TO RAISE THE ISSUE BELOW.

A review of the Appendix to CCIA's Petition and Appendices A, B, and C to this Brief In Opposition reveals that Simon never raised the argument that his privacy claim should not be dismissed pursuant to the GIA because it was based on federal law until he petitioned the Colorado Supreme Court. The Colorado Supreme Court will generally not consider a writ of certiorari on an issue which was not presented to the trial court or Court of Appeals. *Denver v. Desert Truck Sales, Inc.*, 837 P.2d 759, 765 (1992). Likewise, this Court generally will not hear issues which have not been presented below. *Yee v. City of Esc. idido*, 503 U.S. 519, 536, 112 S. Ct. 1522, 1533 (1992) (Court considers questions not raised at the petition stage only in "the most exceptional cases"); *City of Springfield v. Kibbe*, 480 U.S. 257, 258-259 (1987) (dismissing writ as improvidently granted where argument was neither briefed nor argued to the court of appeals nor raised at the petition stage).

Beyond the bald assertions in Simons' complaint and their Petition that CCIA released confidential information which violated Simon's privacy rights, the Simons have never explained this cause of action. The mere conclusory assertion that a federal right has been violated is insufficient to state a cause of action. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). Simon cites no constitutional basis, no case authority, and no specific facts to support this claim. The Simons have not presented any compelling reason for this Court to exercise its supervisory power.

IV. CONCLUSION

The Conditional Cross Petition for Certiorari should be denied for reasons set out above. Simons' first basis does not present a federal question unless viewed as whether CCIA should be granted Eleventh Amendment protection. If so that issue merely supports CCIA's Petition for Certiorari review. The second basis, denial of equal protection or due process is not supported by any federal authority. Clearly, a rational basis exists for the State of Colorado to provide the CCIA protection from unlimited liability under the Colorado Governmental Immunity Act. The third basis should not be reviewed because Simons did not properly preserve the issue in that they failed to present their current argument to the trial court or the Colorado Court of Appeals. Again, Simons cite no federal authority in support of their request. Finally, the Simons fail to present any clear basis for this Court to exercise its jurisdiction such as a clear conflict between the Colorado Supreme Court's decision and decisions of this Court or the decisions of other federal appellate courts.

DATED THIS 7th day of April 1998.

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APPENDIX A

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Civil Action No. 93CV1982, Courtroom 8

PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

MARK SIMON, CHERYL SIMON and MALACHAI SIMON,

Plaintiffs,

v.

THE STATE OF COMPENSATION INSURANCE AUTHORITY,
THE STATE COMPENSATION INSURANCE FUND, and
THE COLORADO COMPENSATION INSURANCE AUTHORITY,

Defendants.

COMES NOW the Plaintiffs, Mark Simon, Cheryl Simon, and Malachai Simon (hereinafter referred to collectively as "Plaintiffs"), by and through their attorneys of record, Andrew T. Brake, P.C., and for their Brief in Response to Defendants' in Support of Motion to Dismiss state:

INTRODUCTION

The Defendants, The State Compensation Insurance Authority ("SCIA"), The State Compensation Insurance Fund ("SCIF"), and The Colorado Compensation Insurance Authority ("CCIA") (hereinafter collectively referred to as "Defendants") filed a Motion to Dismiss and Brief in Support of Motion to Dismiss the Plaintiffs claims for relief essentially asserting five arguments. Although the Defendants' Brief in Support of Motion to Dismiss is somewhat convoluted, the Defendants are apparently asserting that the Plaintiffs claims should be dismissed for the following reasons:

1. The second through seventh claims for relief are barred by the Colorado Governmental Immunity Act, C.R.S. § 24-10-101 *et seq.*, as the Defendants are a political subdivision of the State of Colorado and the Plaintiffs claims lie in tort or could lie in tort;

2. The third claim for relief is specifically barred against public entities;

3. The Plaintiffs' claim for punitive damages is barred by the Colorado Governmental Immunity Act, and in a circular argument, that the punitive damages claims are barred because they are derivative of the claims which are barred by the Colorado Governmental Immunity Act;

4. The Plaintiffs claims must be dismissed for failure to comply with the notice requirements of the Colorado Governmental Immunity Act, including specifically C.R.S. § 24-10-109; and

5. Plaintiffs' claim based upon violation of 42 U.S.C. § 1983 are barred, as the Defendants are not "persons" within the meaning of said statute.

Upon review of the actual facts, and relevant case law, it is apparent that the Defendants arguments should be disregarded. As such, the Plaintiffs' claims are properly before this Court and should be permitted to proceed forward.

STATEMENT OF FACTS

This action arose as a result of the contractual relationship between the Defendants and Plaintiff Mark Simon. Specifically, the Defendants, and each of them, are - were State chartered insurance companies, created pursuant to statute, to provide workmen's compensation insurance to various entities within the State of Colorado in direct competition with various private insurance companies. Plaintiff Mark Simon, along with his partners, applied for and received Workmen's Compensation insurance from SCIF during the year 1982. Plaintiff Mark Simon became a sole proprietor of the business in or about 1984, and notified SCIF that he was the new insured, and the organization was entitled "Mark Simon d/b/a Rocky Mountain General." Plaintiff Mark Simon paid premiums for Workmen's Compensation insurance, including for himself, from 1984 forward, including specifically the premium for the month of January, 1985. On or about January 15, 1985, Plaintiff Mark Simon, while performing duties on behalf of Rocky Mountain General, suffered a pelvic crush injury, and thereafter required substantial medical care. Please see the Plaintiff's First Amended Complaint And Jury Demand, a copy of which is attached hereto and incorporated herein by reference as Exhibit "A".

As a result of said on the job injury, Plaintiff Mark Simon made a claim for insurance benefits with SCIF, which claim was denied. Specifically, SCIF maintained that Plaintiff Mark Simon, as a sole proprietor, was not subject to coverage under the terms of the policy. Plaintiff Mark Simon challenged the decision of SCIF and a hearing was held before Administrative Law Judge Edwin A. Felter, Jr., on or about January 11, 1988, with the sole issue being whether or not Plaintiff Mark Simon was covered by Workmen's Compensation insurance on the date of his injuries through SCIF. In a decision dated November 8, 1988, Judge Felter determined that Plaintiff Mark Simon's injuries were, in fact, covered by the Workman's Compensation Insurance Policy issued to Rocky Mountain General by SCIF. Please see Exhibit "A".

On or about July 1, 1987, SCIA took over the operations of SCIF and was the responsible party for purposes of making payments under Plaintiff Mark Simon's Workmen's Compensation claim. After it was determined that the injury was, in fact, covered, SCIA disputed Plaintiff Mark Simon's entitlement to temporary disability benefits and medical benefits. Plaintiff Mark Simon *again* had to challenge the decision on his entitlement to workmen's compensation insurance benefits pursuant to the policy obtained by Rocky Mountain General from SCIA. In an Order dated July 12, 1989, Administrative Law Judge Felter awarded Plaintiff Mark Simon medical and temporary disability payments. At that time, SCIA appealed both decisions to the Industrial Claims Appeals Panel. On or about March 5, 1990, both of the Administrative Law Judges' Orders were affirmed. Please see Exhibit "A".

On or about April 5, 1990, SCIA filed a General Admission of Liability regarding temporary/total disability. On or about May 14, 1990, Plaintiff Mark Simon, by and through counsel, objected to the admission of liability, and

filed a Motion to Reopen relative to the issue of any offsets to which SCIA may be entitled. On or about August 28, 1990, a hearing was held before Administrative Law Judge Felter on the issue of the offsets to which SCIA was entitled. The determination of the Administrative Law Judge was again in favor of Plaintiff Mark Simon. *Again*, the decision was appealed, and *again*, the determinations on the appeal were in Plaintiff Mark Simon's favor. Please see Exhibit "A".

On or about July 1, 1990, CCIA replaced and otherwise assumed the obligations of SCIA. Plaintiff Mark Simon had also filed a third-party suit regarding his injuries seeking damages. The suit was settled in approximately September, 1988, with the approval of SCIA. The suit and settlement thereof was improperly used as a basis for a claimed offset by SCIA relative thereto. From the date of Plaintiff Mark Simon's claim through September, 1992, more than *seven years* later, the Defendant inexplicably had not made any payments to or on behalf of Plaintiff Mark Simon, despite their obligations and duties pursuant to the terms and conditions of the insurance contract, as well as pursuant to the decisions of the Administrative Law Judge and the Industrial Claims Appeal Panel. Please see Exhibit "A".

Additionally, Plaintiff Mark Simon became involved in the legislative processes that relate to the Workmen's Compensation laws of the State of Colorado. As a result of his involvement, the Defendant released private, confidential and/or false information regarding Plaintiff Mark Simon, contrary to the laws of the State of Colorado and of Federal law, including as advocated by the Defendants, in an attempt to discredit Plaintiff Mark Simon and further deprive him of the benefits to which he was rightfully entitled. Please see Exhibit "A".

As a result of the foregoing willful, wanton, and malicious conduct by the Defendants, Plaintiff Mark Simon's relationship with his wife, Plaintiff Cheryl Simon, and his son, Plaintiff Malachai Simon, were severely damaged. Accordingly, the Plaintiffs filed the instant action asserting seven claims for relief against the Defendants as follows:

1. Violation of 42 U.S.C. § 1983;

2. Bad Faith/Breach of Fiduciary Duty;

3. Outrageous Conduct;

4. Loss of Consortium;

5. Interference with Familial Relations;

6. Invasion of Privacy; and

7. Violation of State and Federal Law.

ARGUMENT

A. STANDARD APPLICABLE TO A MOTION TO DISMISS PURSUANT TO RULE 12, C.R.C.P.

The standard to be applied in determining the Defendants' Motion to Dismiss has long been established in the State of Colorado. Specifically, the Courts have held on numerous occasions that a Motion to Dismiss is viewed with disfavor, and in order to grant same, it must clearly appear that the Plaintiff would not be entitled to relief under any claim supported by the facts plead. *Davidson v. Dill*, 503 P.2d 157, 180 Colo. 123 (1972); *National Sur. Corp. v. Citizens State Bank*, 593 P.2d 362, 41 Colo.App. 580, *affirmed* 612 P.2d 70, 190 Colo. 497, *appeal after remand*

651 P.2d 460, *appeal after remand* 734 P.2d 663; and *Fort v. Holt*, 508 P.2d 792 (Colo.App. 1973).

In making such a determination, all matters well plead in the Complaint must be treated as true. *Abts v. Board of Ed. of School Dist. Re-1 Valley in Logan County*, 622 P.2d 518 (1980); and *Colorado Nat. Bank of Denver v. F.E. Biegert Co., Inc. of Denver*, 438 P.2d 506, 165 Colo. 78 (Colo. 1968). Further, the allegations contained in the Complaint must be viewed in the light most favorable to the Plaintiff, and said allegations must be strictly construed against the Defendant. *Bell v. Aronld*, 487 P.2d 986, 175 Colo. 277 (Colo. 1971); and *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991).

In applying the foregoing standard to the instant action, it is clear that the Defendants' Motion to Dismiss should be denied.

B. THE COLORADO GOVERNMENTAL IMMUNITY ACT DOES NOT BAR THE PLAINTIFF'S SECOND THROUGH SEVENTH CLAIMS FOR RELIEF.

C.R.S. § 8-45-101, in pertinent part provides:

> There is hereby created the Colorado compensation insurance authority which shall be a body corporate and a political subdivision of the state. The authority shall not be an agency of state government, nor shall it be subject to administrative direction by any state agency except as provided in this article, and except for the purposes of the "Colorado Governmental Immunity Act",

> article 10 of title 24, C.R.S., and except for inclusion in the risk management fund and by the division of risk management as provided in part 15 of article 30 of title 24, C.R.S.

A similar provision existed relative to SCIA. The clear implication of the foregoing is that the CCIA and SCIA are subject to the provisions of, the Colorado Governmental Immunity Act. However, it should be noted that the effect of holding the Defendants immune from suit would allow it to disregard laws applicable to insurance companies providing workmen's compensation insurance, which laws are for the benefit and protection of the individual workers of this State.

The workers' compensation laws and laws generally applicable to insurers provide certain guidelines to and/or place certain requirements on insurers relative to the manner in which they are to process claims. In addition, the Courts of this State have imposed additional requirements on insurers in Colorado to protect the individuals who are the beneficiaries of said insurance. In setting forth the basis for imposing said requirements on insurers, the Colorado Supreme Court held:

> Furthermore, once a calamity has befallen an employee covered by worker's compensation or an insured covered under a private insurance contract, the injured party is particularly vulnerable because of the injury or loss. Recognizing that a contract claim for the insurance proceeds may not effectively protect the injured party in such a situation, the Supreme Court of Rhode Island commented as follows: [I]nsurers, backed by sufficient financial resources, are encouraged to

> delay payment of claims to their insureds with an eye towards settling for a lesser amount than that due under the policy . . . the inequity of this situation become particularly apparent in the area of disability insurance in which the insured, often pursued by creditors, and devoid of bargaining power, may easily be persuaded other than that provided for in the insurance contract. *Bibeault v. Hanover Insurance Co.*, 417 A.2d 313, 318 (R.I. 1980); see also *Noble v. National American Life Insurance Co.*, 128 Ariz. 188, 624 P.2d 8667 (1981). See generally *Spencer v. Aetna Life & Casualty Co.*, 227 Kan. 914, 611 P.2d 149 (1980) discussing the court's reasons for adopting bad faith tort. In light of these considerations of insurance generally, and of worker's compensation in particular, we conclude that a claimant of compensation or benefits may bring an action in tort for bad faith by an insurer.

Travelers Ins. Co. v. Savio, 706 P.2d 1258, 1273-1374 (Colo. 1985).

To hold that the Colorado Governmental Immunity Act exculpates the Defendants in this case would send a message that such entities are, for all intents and purposes, not subject to the workers' compensation laws of the State of Colorado and this State's insurance laws generally while holding private insurance companies, the Defendants' competition, responsible for same. Further, such a holding would be contrary to the purpose and intent behind the workers' compensation laws, and would place the

Governmental Immunity Statute in a superior position to other statutes.

The ultimate effect of such a holding would be to treat, unequally, several groups of people depending upon the identity of their insuror. Specifically, individuals insured by a private company would be treated differently than those to whom the CCIA provides workers' compensation insurance coverage. In the case of an employee whose employer purchased workers' compensation insurance coverage from a private insurer, the employee could, pursuant to the laws of the State of Colorado, assert and if proved, recover on a bad faith claim against said entity, while an employee of an employer who has purchased workers' compensation insurance coverage from the CCIA would not be able to assert a claim for bad faith for identical conduct, even though both entities are insurance companies. This fact is best underscored by the fact that the claim of bad faith/breach of fiduciary duty has been recognized relative to adjusters who are not responsible to pay any claim that is submitted. As such, an independent adjustor, adjusting claims on behalf of the Defendants, could potentially be found responsible and/or liable for bad faith conduct and be subject to satisfying such a judgment, while the Defendants would not, even though the independent adjustor and the Defendants may have both engaged in the exact same bad faith conduct. Further, an individual who has been subjected to bad faith conduct by an insurance company, as recognized by the Colorado Supreme Court, is extremely vulnerable and suffers substantial damages in addition to the amounts recoverable under the insurance contract. As the purpose of the Courts is to make Plaintiffs whole who have suffered an injury at the hands of the Defendant, to provide immunity to the Defendants in this case, would be to say that employees who are subjected to bad faith conduct at the hands of the Defendants are not entitled to be made whole, while employees whose insurance is provided by a private

company, such Aetna Insurance Company, would be entitled to be made whole. This is especially inequitable as, in most instances the employee has no control over which insurance company, the Defendants or a private insurance company, will provide workmen's compensation insurance. Such a determination is contrary to the equal protection provisions of the United States Constitution.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It has long been held that the first step in analyzing the foregoing is whether or not the law in question treats similarly situated persons in a like manner, including the Courts of the State of Colorado. *Charlton v. Kimata*, 815 P.2d 946 (Colo. 1991); *Harris v. The Ark*, 810 P.2d 226 (Colo. 1991). After such a determination is made, an objection that a State statute denies a party the equal protection of the laws can only be sustained if the statute treats the party differently from what it does others who are in the same situation as he. *Ohio v. Dollison*, 194 U.S. 447, 24 S.Ct. 703 (1904). In applying the foregoing test to the instant action, it is clear that applying the Colorado

Governmental Immunity Act to one insurer precluding a claim for bad faith and one insured, while requiring all other insurers to be subject to a claim for relief, constitutes disparate treatment of similarly situated individuals and deprives them of the opportunity to be made whole.

Further, no rational basis exists for such a determination, as the Defendants in this case are nothing more than an insurance company and private organizations are permitted to provide the same coverage as the Defendants. Accordingly, the only effect of applying the Colorado Governmental Immunity Act to the Defendants is to deprive the Plaintiffs of the opportunity to be made whole solely on the basis of the selection of an insuror. As such, the application of the Colorado Governmental Immunity Act to the Defendants in this action is contrary to the provisions of the United States Constitution.

It should be noted that this argument relates to the Plaintiffs' Second through Fifth Claims For Relief, as said claims arise out of the bad faith conduct of the Defendants.

It should also be noted that to determine that the Defendants are not liable for their bad faith conduct, and likewise all other similarly situated organizations, would contravene the very basis for the recognition of the claim in the first instance. In *Travelers Ins. Co. v. Savio*, the Colorado Supreme Court recognized that insurers and insureds are on unequal footing, and that insurors often may utilize this unequal position to limit its responsibilities under the terms of the insurance contract, and effectuate a financial gain in their favor. Without the cause of action for bad faith recognized in *Travelers Ins. Co. v. Savio*, public entities, such as the Defendants would be free to engage in bad faith conduct with impunity, thereby determining the fact of any employee's bad faith claim relative to workers' compensation insurance coverage solely based upon who their employer

decided to purchase insurance coverage from, a decision the employee normally has no control over. In fact, to deprive Plaintiffs of a claim based upon governmental immunity would result in disparate treatment to them and to other employees within the State of Colorado. Further, as indicated hereinabove, the purpose and intent behind the workers' compensation act is to provide medical and other benefits to any employee injured on the job, regardless of the manner in which the injury occurred, the purpose being that any injured worker should not be forced to suffer catastrophic loss as a result of an injury. Additionally, the workers' compensation act was enacted to help the injured employee convalesce as quickly as possible, and to enable the employee to return to the work force as quickly as possible. As insurers in the past have engaged in bad faith conduct, thereby necessitating the need for the *Travelers Ins. Co. v. Savio* decision, it is reasonable to assume that such a situation may arise again if public entities such as the Defendants are immune from suit relative to their duties as insurers, and the deterrent effect of *Travelers* would be lost.

Further, with regard to the Plaintiffs' Sixth and Seventh Claims For Relief, those claims are based upon the violation of State and Federal law in the Defendants' dissemination of private, confidential and/or false information about the Plaintiff Mark Simon which occurred relative to the legislature's consideration of the workmen's compensation laws in this State. The Defendants, in taking said action, precludes the Plaintiffs' participation in and/or otherwise effectively denies the Plaintiffs access to the political process. Again, this conduct is unconstitutional, and as such, the Defendants' Motion to Dismiss should be denied.

Finally, the provisions of the Colorado Governmental Immunity Act are inapplicable in this case, as the Plaintiffs' claims have contractual underpinnings in that the claims are

specifically a result of the insurance contract, and Defendants' conduct relative thereto. Claims based upon contract are not subject to the immunities contained in the Colorado Governmental Immunity Act. Accordingly, the provisions of the Colorado Governmental Immunity Act should not be a bar to the Plaintiffs' Claims.

C. THE PROVISIONS OF THE COLORADO GOVERNMENTAL IMMUNITY ACT DO NOT PRECLUDE THE AWARD OF PUNITIVE DAMAGES AGAINST AURORA IN THIS CASE.

As outlined hereinabove, the effect of the Colorado Governmental Immunity Act in this case is to work unconstitutional deprivation of Plaintiffs' right to equal protection of the laws. Accordingly, the provisions of said act are inapplicable in the case where Defendants were acting as an insurer. Due to the inapplicability of the act, any provisions limiting the scope of relief are likewise inapplicable, thereby entitling Plaintiffs to all damages which are otherwise recoverable on their claims. This contention is supported by the provisions of the act itself which indicates that in instances in which the act is inapplicable, the public entity is to be treated as a private individual. C.R.S. § 24-10-107. As such, the Defendants' Motion To Dismiss Plaintiffs' claim to punitive damages should be denied.

The foregoing position is especially true in light of the purpose and intent of punitive damages which is to punish those who engage in egregious, willful and wanton conduct which damages another. In the case of an insurer providing coverage to an employee injured on the job, who is more vulnerable and susceptible to losing everything including their ability to survive, such as Defendants in this case, and the unequal footing of the parties, egregious conduct such as that engaged in by Defendants mandates the award of punitive damages as a deterrent to such behavior in the

future. The importance of such a deterrent is evident by the vast disparity of power between the parties. It should also be noted that other courts have determined that punitive damages are, in some cases, awardable against public entities. See *Cole v. City of Houston*, 442 S.W.2d 445 (Tex.App.-Houston 1987). Accordingly, the claim for punitive damages to Plaintiffs should not be dismissed.

D. DEFENDANTS' ARGUMENTS REGARDING C.R.S. § 24-10-109 ARE NOT FOUNDED UPON THE EVIDENCE IN THIS CASE, AND PLAINTIFFS DID PROPERLY GIVE NOTICE RELATIVE TO THEIR CLAIMS.

Defendants, in their brief, essentially assert that Plaintiffs failed to comply with the notice provisions of C.R.S. § 24-10-109 relative to her claim of breach of the covenant of good faith and fair dealing. Defendants also maintain that actual compliance with the provisions of C.R.S. § 24-10-109 is mandatory, and accordingly, Plaintiffs' claims should be dismissed. Defendants have misrepresented the evidence in this case. In reviewing the actual facts, it is clear that Plaintiffs have properly complied with the provisions of C.R.S. § 24-10-109, to the extent applicable.

As an initial matter, C.R.S, § 24-10-109 falls within the provisions of the Colorado Governmental Immunity Act. As outlined hereinabove, the Colorado Governmental Immunity Act is inapplicable, and as such, no notice was required. In any event, the evidence is clear that Plaintiffs did, in fact, give timely notice to Defendants of their claims in accordance with the provisions of C.R.S. § 24-10-109. The referenced statute specifically provides:

> (1) Any person claiming to have suffered an injury by a public entity or by an

> employee thereof while in the course of such employment shall file a written notice as provided in this section within one hundred eighty days after the date of the discovery of the injury, regardless of whether the person then knew all of the elements of a claim or of a cause of action for such injury. Compliance with the provisions of this section shall be a jurisdictional prerequisite to any action brought under the provisions of this article, and failure of compliance shall forever bar any such action.

In interpreting this statute, the Colorado Supreme Court has held:

> . . . On the contrary, we believe that these interests can best be accommodated by interpreting the term "compliance" in the 1986 version of section 24-10-109(1) as requiring nothing less than, nor more than, "substantial compliance."
>
> Substantial compliance requires a claimant, within 180 days of *the discovery* of an injury, to file a written notice with the public entity and to make a good faith effort to include within the notice, to the extent the claimant is reasonably able to do so, each item of information listed in section 24-10-109(2). In determining whether a claimant has substantially complied with the notice requirement, a court may consider whether and to what extent the public entity has been adversely affected in its ability to defend against the

claim by reason of any omission or error in the notice.

Woodsmall v. Regional Transp. Dist., 800 P.2d 63, 69 (Colo. 1990). In *Miller v. Armstrong World Industries*, 817 P.2d 111, 113 (Colo. 1991), the Colorado Supreme Court determined that a cause of action for injury to a person accrues on the date both the injury and its cause are known or should have been known. While the *Miller* decision did not directly deal with the notice provisions of the Colorado Governmental Immunity Act, when read in conjunction with the *Woodsmall* decision, it provides substantial guidance. Specifically, an individual has not "discovered" an injury, thereby invoking the 180 day notice period until such time as said individual knows of the injury and cause, although all of the elements need not be known. Such is the standard that should be applied in the instant action.

The Plaintiffs have filed three notices in this particular case, the first notice on or about August 29, 1990, the second notice on or about June 12, 1991, and the third notice on or about December 10, 1992. Copies of the referenced letters are attached hereto and incorporated herein by reference as Exhibits "B", "C", and "D", respectively. The wrongful conduct of the Defendants was not learned of immediately, and upon determining that the Defendants had engaged in such conduct, the Plaintiffs timely gave notice. Further, as the Defendants' wrongful conduct has been ongoing, the additional notices were given. All of the notices were well within the time frames referenced by the statute. Please see *Morrison v. City of Aurora*, 745 P.2d 1042 (Colo.App. 1987); and *Dominguez v. Babcock*, 696 P.2d 338, *affirmed* 727 P.2d 362 (Colo.App. 1984).

Pursuant to the *Woodsmall* and *Miller* decisions, it is clear that Plaintiffs complied with C.R.S. § 24-10-109, as

Defendants' ability to defend were not compromised, nor was its ability to investigate and remedy its conduct, especially in light of Defendants' ...ntial contin... bad faith conduct which commenced ... or about ... and continues through the present. A...rdingly, De...ants' contentions are without merit and should be disrega...d.

E. PLAINTIFFS' CLAIM FOR OUTRAGEOUS CONDUCT IS NOT BARRED.

The Defendants, in relying upon *Belfiore v. Dept. Of Highways*, 847 P.2d 244 (Colo. App. 1993), maintain that a claim for outrageous conduct may not be asserted against the Defendants. The *Belfiore* decision and the determination that damages for outrageous conduct could not be asserted against a public entity were based upon the provisions of C.R.S., § 24-10-114(4).

This position, as outlined hereinabove, is unmeritorious. Specifically, the provisions of the Colorado Governmental Immunity Act are unconstitutional as applied to the Defendants. As such, the provisions of C.R.S., § 24-10-114(4) are not applicable to this case, and said statute and the *Belfiore* decision cannot preclude such a claim.

F. PLAINTIFFS HAVE PROPERLY ASSERTED A CLAIM FOR RELIEF BASED UPON 42 U.S.C. § 1983.

The Defendants contend that they, as state agencies, are not "persons" within the meaning of 42 U.S.C. § 1983. However, said contention is unmeritorious in light of the actual facts. In reality, the Defendants are not agencies of state government, but are, in fact, a state "corporation".

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It has been determined that corporations are "persons" for purposes of bringing suit under 42 U.S.C. § 1983. *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 490 F.Supp. 800 (D.C. Puerto Rico 1975), aff'd. 553 F.2d 701; and *Ozlu v. Lock Haven Hospital*, 368 F.Supp. 283 (D.C. Pa. 1973). As such, the Defendants are "persons" within the meaning of the statute, and Plaintiffs have properly stated a claim against the Defendants for violation of 42 U.S.C. § 1983. Therefore, the Defendants' Motion to Dismiss Plaintiffs' 42 U.S.C. § 1983 claim should be denied.

CONCLUSION

For the reasons outlined hereinabove, the Plaintiff has properly asserted claims for relief against the named Defendants, and the Defendants' Motion To Dismiss should be denied. Specifically, the Colorado Governmental Immunity Act is inapplicable to the Plaintiffs' claims and all such claims, including Plaintiffs' claim for punitive damages should be allowed to proceed forward. Further, Plaintiffs have properly stated a claim under 42 U.S.C. § 1983 as the Defendants are "persons" within the meaning of said statute.

WHEREFORE, Plaintiffs respectfully request that this Court enter an Order denying the Defendants' Motion To Dismiss. Additionally, Plaintiff requests such other and further relief as this Court deems just and proper.

PLAINTIFFS REQUEST A HEARING AT WHICH TIME ORAL ARGUMENT MAY BE MADE ON THE FOREGOING ISSUES.

DATED this 22nd day of July, 1993.

Respectfully submitted,

ANDREW T. BRAKE, P.C.

By /s/ Lee Judd
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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 1993, true and correct copies of the above and foregoing PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS was deposited in the United States mail, postage prepaid, addressed to the following:

George S. Meyer, Esq.
Assistant Attorney General
Tort Litigation Section
1525 Sherman Street, Fifth Floor
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Mark Simon
Cheryl Simon
Malachai Simon
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/s/ Dorie Edwards

APPENDIX B

COLORADO COURT OF APPEALS, STATE OF COLORADO

Case No. 93CA2211

OPENING BRIEF OF PLAINTIFFS-APPELLANTS MARK SIMON, CHERYL SIMON AND MALACHAI SIMON

MARK SIMON, CHERYL SIMON, and MALACHAI SIMON,

Plaintiffs-Appellants,

vs.

THE STATE COMPENSATION INSURANCE AUTHORITY, THE STATE COMPENSATION INSURANCE FUND, and THE COLORADO COMPENSATION INSURANCE AUTHORITY,

Defendants-Appellees.

Appeal from the Honorable Larry J. Naves
Denver County District Court, Courtroom 8
Civil Action No. 93-CV-1982

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COMES NOW the Plaintiffs-Appellants Mark Simon ("Mr. Simon"), Cheryl Simon, and Malachai Simon (hereinafter referred to collectively as "Plaintiffs"), by and through their attorneys of record, Andrew T. Brake, P.C., and for their opening brief states:

STATEMENT OF ISSUES PRESENTED

A. Whether the Trial Court erred in granting Defendants-Appellants The State Compensation Insurance Authority's ("SCIA"), The State Compensation Insurance Fund's ("SCIF"), and The Colorado Compensation Insurance Authority's ("CCIA") (hereinafter collectively referred to as "Defendants") Motion to Dismiss and in denying Plaintiffs' Motion to Reconsider the Court's Order Dated September 27, 1993, and Brief in Support Thereof.

II.
STATEMENT OF THE CASE

This action arose as a result of the conduct of the Defendants in administering, processing, and/or handling Mr. Simon's worker's compensation claims. Specifically, Mr. Simon suffered a pelvic crush injury in the course of his employment on or about January 15, 1985. Thereafter, on a continuing basis, each of the Defendants, at various times, refused to pay and/or provide the benefits which they were contractually obligated to provide, and which were ordered by the Administrative Law Judge who heard the case on behalf of the Worker's Compensation Division, and the Industrial Claims Appeals panel. In fact, the Defendants inexplicably refused to make any payments or provide any benefits to Mr. Simon in any fashion until in or about September, 1992.

Mr. Simon also became involved in the legislative process relative to the worker's compensation laws of the State of Colorado. As a result of Mr. Simon's involvement, the Defendants released private, confidential and/or false information regarding Mr. Simon, contrary to the laws of the State of Colorado and of federal law, in an attempt to discredit Mr. Simon and further deprive him of the benefits to which he was entitled. As a result of the Defendants' conduct, the Plaintiffs, and each of them suffered substantial harm and damage.

The Plaintiffs provided the requisite notice pursuant to C.R.S. § 24-10-109, and ultimately commenced Civil Action No. 93 CV 1982 in the District Court, City and County of Denver, State of Colorado alleging seven (7) claims for relief. The Defendants filed a motion to dismiss maintaining that all of the Plaintiffs' claims, with the exception of their violation of 42 U.S.C. § 1983 claim, were barred by the Colorado Governmental Immunity Act ("CGIA"), C.R.S. § § 24-10-101 *et seq.*, and that the claimed violation of 42 U.S.C. § 1983 was barred as the Defendants are not "persons" within the meaning of the statute. Additionally, the Defendants maintained that the Plaintiffs' claim for punitive damages was barred by the CGIA.

The Trial Court, in an Order dated September 27, 1993, granted the Defendants' Motion to Dismiss, finding that the Plaintiffs' state law claims were barred by the CGIA, and that the Plaintiffs' 42 U.S.C. § 1983 claim was barred because the Defendants are not "persons" within the meaning of the referenced statute. The Plaintiffs filed a Motion to Reconsider the Court's Order Dated September 27, 1993, and Brief in Support Thereof, essentially maintaining that the constitutionality of the CGIA, as applied to the facts of this case, had never before been addressed, that the CGIA was unconstitutional, and that Plaintiffs' 42 U.S.C. § 1983 claim was properly asserted. The Trial Court, in an Order dated

December 2, 1993, denied the Plaintiff's Motion to Reconsider the Court's Order Dated September 27, 1993, and Brief in Support Thereof. Thereafter, the Plaintiffs commenced the instant appeal.

III.
STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW

This action arose as a result of the contractual relationship between the Defendants and Mr. Simon. Specifically, the Defendants, and each of them, are or were State chartered insurance companies, created pursuant to statute, to provide workmen's compensation insurance to various entities within the State of Colorado in direct competition with various private insurance companies. Mr. Simon, along with his partners, applied for and received Worker's Compensation insurance from SCIF during the year 1982. Mr. Simon became a sole proprietor of the business in or about 1984, and notified SCIF that he was the new insured, and the organization was entitled "Mark Simon d/b/a Rocky Mountain General." Mr. Simon paid premiums for Worker's Compensation insurance, including for himself, from 1984 forward, including specifically the premium for the month of January, 1985. On or about January 15, 1985, Plaintiff Mark Simon, while performing duties on behalf of Rocky Mountain General, suffered a pelvic crush injury, and thereafter required substantial medical care. Tr. Rec. P. 9 through 15.[1]

As a result of said on the job injury, Mr. Simon made a claim for insurance benefits with SCIF, which claim was

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[1] Tr. Rec. refers to the Record on Appeal in Civil Action No. 93 CV 1982 in the District Court, City and County of Denver, State of Colorado.

denied. Specifically, SCIF maintained that Mr. Simon, as a sole proprietor, was not subject to coverage under the terms of the policy. Mr. Simon challenged the decision of SCIF and a hearing was held before Administrative Law Judge Edwin A. Felter, Jr., on or about January 11, 1988, with the sole issue being whether or not Plaintiff Mark Simon was covered by Worker's Compensation insurance on the date of his injuries through SCIF. In a decision dated November 8, 1988, Judge Felter determined that Plaintiff Mark Simon's injuries were, in fact, covered by the Workman's Compensation Insurance Policy issued to Rocky Mountain General by SCIF. Tr. Rec. P. 9 through 15.

On or about July 1, 1987, SCIA took over the operations of SCIF and was the responsible party for purposes of making payments under Mr. Simon's Worker's Compensation claim. After it was determined that the injury was, in fact, covered, SCIA disputed Mr. Simon's entitlement to temporary disability benefits and medical benefits. Mr. Simon *again* had to challenge the decision on his entitlement to workmen's compensation insurance benefits pursuant to the policy obtained by Rocky Mountain General from SCIA. In an Order dated July 12, 1989, Administrative Law Judge Felter awarded Mr. Simon medical and temporary disability payments. At that time, SCIA appealed both decisions to the Industrial Claims Appeals Panel. On or about March 5, 1990, both of the Administrative Law Judges' Orders were affirmed. Tr. Rec. P. 9 through 15.

On or about April 5, 1990, SCIA filed a General Admission of Liability regarding temporary/total disability. On or about May 14, 1990, Mr. Simon, by and through counsel, objected to the admission of liability, and filed a Motion to Reopen relative to the issue of any offsets to which SCIA may be entitled. On or about August 28, 1990, a hearing was held before Administrative Law Judge Felter

on the issue of the offsets to which SCIA was entitled. The determination of the Administrative Law Judge was again in favor of Mr. Simon. *Again*, the decision was appealed, and *again*, the determinations on the appeal were in Mr. Simon's favor. Tr. Rec. P. 9 through 15.

On or about July 1, 1990, CCIA replaced and otherwise assumed the obligations of SCIA. Mr. Simon had also filed a third-party suit regarding his injuries seeking damages. The suit was settled in approximately September, 1988, with the approval of SCIA. The suit and settlement thereof was improperly used as a basis for a claimed offset by SCIA relative thereto. From the date of Mr. Simon's claim through September, 1992, more than *seven years* later, the Defendant inexplicably had not made any payments to or on behalf of Mr. Simon, despite their obligations and duties pursuant to the terms and conditions of the insurance contract, as well as pursuant to the decisions of the Administrative Law Judge and the Industrial Claims Appeal Panel. Tr. Rec. P. 9 through 15.

Additionally, Mr. Simon became involved in the legislative processes that relate to the Worker's Compensation laws of the State of Colorado. As a result of his involvement, the Defendant released private, confidential and/or false information regarding Mr. Simon, contrary to the laws of the State of Colorado and of federal law, including as advocated by the Defendants, in an attempt to discredit Mr. Simon and further deprive him of the benefits to which he was rightfully entitled. Tr. Rec. P. 9 through 15.

As a result of the foregoing willful, wanton, and malicious conduct by the Defendants, Mr. Simon's relationship with his wife and his son were severely

damaged. Accordingly, the Plaintiffs filed the instant action asserting seven claims against the Defendants as follows:

1. Violation of 42 U.S.C. § 1983;
2. Bad Faith/Breach of Fiduciary Duty;
3. Outrageous Conduct;
4. Loss of Consortium;
5. Interference with Familial Relations;
6. Invasion of Privacy; and
7. Violation of State and Federal Law.

Tr. Rec. P. 9 through 15.

IV.
SUMMARY OF ARGUMENT

The Plaintiffs' state law claims are *not* barred by the CGIA, as it is unconstitutional for a variety of reasons. It should be noted that the constitutionality of the CGIA as applied to the facts of this case is one of first impression in this State.

A strict scrutiny standard applies, because under the facts of this case, the Plaintiffs' fundamental rights as guaranteed by Article II § 6 of the Colorado Constitution have been violated. Specifically, the Plaintiffs are being barred access to the Courts of Justice to remedy injuries suffered, and the Defendants cannot establish any compelling governmental interest relative to the CGIA under the facts of this case.

Dismissal of the Plaintiffs' State law claims is violative of the due process guarantee. The Plaintiffs have a property interest in their claims against the Defendants, including as recognized by the bankruptcy laws, which has been deprived by the application of the CGIA to nothing more than an

insurance company. This denial is further in contravention of Article II § 6 of the Colorado Constitution.

Even assuming the strict scrutiny standard referenced hereinabove is inapplicable, the CGIA under the facts of this case is violative of the equal protection of the laws. The Plaintiffs are being treated disparately solely upon the selection of a worker's compensation insurer, which normally the injured employee has no control over. This disparity was underscored in *Jordan v. City of Aurora and GAB Business Services, Inc.* 92 CA 1632 (Colo.App. 1993), wherein a self-insured governmental entity was protected from a bad faith claim based upon the handling of a worker's compensation claim while a private adjusting firm was not, even though the conduct complained of was the same. This disparity of treatment is not real, but illusory, and the Defendants cannot establish any rational basis for treatment and/or protection which is different from that applied to insurance companies like State Farm Insurance, and insureds like the Plaintiffs.

The Defendants are "persons" within the meaning of 42 U.S.C. § 1983, as they are a corporation which, although a subdivision of the State, are not subject to authority or direction by the State, are not dependent on the State for resources, have the ability to sue or be sued, and have the authority to enter into contracts.

V.
ARGUMENT

A. APPLICABLE STANDARD OF LAW.

The standard to be applied in determining a Motion to Dismiss has long been established in the State of Colorado. Specifically, the Courts have held on numerous occasions that a Motion to Dismiss is viewed with disfavor, and in

order to grant same, it must clearly appear that the Plaintiff would not be entitled to relief under any claim supported by the facts plead. *Davidson v. Dill*, 503 P.2d 157, 180 Colo. 123 (1972); *National Sur. Corp. v. Citizens State Bank*, 593 P.2d 362, 41 Colo.App. 580, *affirmed* 612 P.2d 70, 190 Colo. 497, *appeal after remand* 651 P.2d 460, *appeal after remand* 734 P.2d 663; and *Fort v. Holt*, 508 P.2d 792 (Colo.App.1973).

In making such a determination, all matters well plead in the Complaint must be treated as true. *Abts v. Board of Ed. of School Dist. Re-1 Valley in Logan County*, 622 P.2d 518 (1980); and *Colorado Nat. Bank of Denver v. F.E. Biegert Co., Inc. of Denver*, 438 P.2d 506, 165 Colo. 78 (Colo. 1968). Further, the allegations contained in the Complaint must be viewed in the light most favorable to the Plaintiff, and said allegations must be strictly construed against the Defendant. *Bell v. Arnold*, 487 P.2d 986, 175 Colo. 277 (Colo. 1971); and *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991). This Court, in reviewing this matter, applies the same standard.

In applying the foregoing standard to the instant action, it is clear that the Defendants' Motion to Dismiss should have been denied, and in any event, Plaintiffs' motion to reconsider should have been granted.

B. THE COLORADO GOVERNMENTAL IMMUNITY ACT, AS APPLIED TO THE PLAINTIFFS' SECOND THROUGH SEVENTH CLAIMS FOR RELIEF IS UNCONSTITUTIONAL.

C.R.S. § 8-45-101, in pertinent part provides:

> There is hereby created the Colorado compensation insurance authority which shall be a body corporate and a political subdivision of the state. The authority shall not be an agency of state government, nor shall it be subject to administrative direction by any state agency except as provided in this article, and except for the purposes of the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S., and except for inclusion in the risk management fund and by the division of risk management as provided in part 15 of article 30 of title 24, C.R.S.

The question presented in the instant action is the constitutionality of the CGIA as it applies to claims commenced against the Defendants. Upon Plaintiffs' research of this issue, the constitutionality of the CGIA as applied to any of the Defendants has never before been addressed by the Courts of this State. While the constitutionality of various portions of the CGIA have been made relative to other factual circumstances, such a determination in the present factual situation appears to be one of first impression. Upon close examination of the current factual situation, it is apparent that the application of the CGIA to the Defendants is violative of Article II, § 6 of the Colorado Constitution because it denies the Plaintiffs equal protection of the laws and further violates the Plaintiffs' rights to due process.

1. APPLICATION OF THE COLORADO GOVERNMENTAL IMMUNITY ACT TO THE PLAINTIFFS' SECOND THROUGH SEVENTH CLAIMS FOR RELIEF IS VIOLATIVE OF ARTICLE II, § 6 OF THE COLORADO CONSTITUTION.

In discussing the standard to be applicable to a claim that equal protection of the laws requires that a statute be declared unconstitutional, the Colorado Supreme Court in *Tassian v. People*, 731 P.2d 672 (Colo. 1987) held:

> . . . When the classification creates a suspect class, such as one based on race or national origin, *or interferes with the exercise of a fundamental right, such as the right of free speech or religion*, a standard of strict judicial scrutiny must be applied in resolving an equal protection challenge. The government in such a case must establish that the statutory classification is necessarily related to a compelling governmental interest. . . . (Emphasis added).

Id. 675.

Article II, § 6, of the Colorado Constitution provides:

> Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.

To determine that the Plaintiffs' second through seventh claims for relief are barred by the CGIA would be to deprive the Plaintiffs of a fundamental right as guaranteed by the

Colorado Constitution (i.e. access to the Courts of Justice to remedy injuries suffered). As such, the Defendants must establish a compelling governmental interest is necessarily related to the statute which provides that they are subject to the CGIA, and the Defendants are immune from the Plaintiffs' second through seventh claims for relief. No such compelling governmental interest exists.

Specifically, the Defendants, and each of them, are or were State chartered insurance companies, created pursuant to statute, to provide workmen's compensation insurance to various entities within the State of Colorado in direct competition with various private insurance companies. Further, the Defendants are not agencies of the State, nor are they subject to administrative direction by the State. Finally, the Defendants determine premiums, write insurance policies, and pay claims like any other insurance carrier.

The Defendants should be treated like any other corporation, as the provision of insurance, such as that provided by numerous *private* insurance carriers, is not an essential governmental service or function. Furthermore, to hold that the CGIA exculpates the Defendants in this case would send a message that such entities are not subject to the workers' compensation laws of the State of Colorado and this State's insurance laws generally while holding private insurance companies, the Defendants' competition, responsible for same. The ultimate effect of such a holding would be to treat several groups of people unequally, including the Plaintiffs, depending upon the identity of their insurer.

As the Defendants' can point to no compelling governmental interest in this case, the only logical determination which can be made is that the CGIA is unconstitutional as applied to the Plaintiffs' second through

seventh claim for relief, and Plaintiffs' claims should be reinstated.

2. DISMISSAL OF THE PLAINTIFFS' SECOND THROUGH SEVENTH CLAIMS FOR RELIEF IS VIOLATIVE OF THE DUE PROCESS GUARANTEE.

In *State v. DeFoor*, 824 P.2d 783 (Colo. 1992), the Colorado Supreme Court held:

> The due process guarantee of the Colorado Constitution provides that "[n]o person shall be deprived of life, liberty or property, without due process of law." Colo. Const., art. II, § 25. . . . Claimants rely on *Rosane v. Senger*, 112 Colo. 363, 149 P.2d 372 (1944), for the proposition that the right to damages for injuries constitutes property subject to the protections of the due process guarantee. The plaintiff in *Rosane* contested whether the district court erred in finding that her medical malpractice action was barred by a statute of limitations. We said that "[a] legal right to damage for an injury is property and one can not [sic] be deprived of his property without due process. There can be no due process unless the party deprived has his day in court." *Id.* at 370, 149 P.2d at 375. . . .

Id. at 792.

While the *DeFoor* decision went on to determine that the claimants in that case failed to identify a property interest, said determination was based upon the fact that a *limited* remedy was provided. That is not this case. In this case, the Plaintiffs are being deprived of their property interest in

their claim. This position is bolstered by the body of law which makes up the bankruptcy laws and which require that a debtor list all property in their petition, including claims such as those dismissed in the instant action, as part of the debtor's estate. Further, to deny the Plaintiffs due process of law would likewise be contrary to the provisions of Article II, § 6 of the Colorado Constitution as identified hereinabove.

As such a denial of due process is not permissible, especially under the circumstances of this case in which the Defendants are nothing more than insurance companies. Accordingly, Plaintiffs second through seventh claims for relief should be reinstated, and a determination made that the CGIA is violative of the Plaintiffs' due process rights as applied to the Defendants.

3. THE COLORADO GOVERNMENTAL IMMUNITY ACT, AS APPLIED TO THE PLAINTIFFS' SECOND THROUGH SEVENTH CLAIMS FOR RELIEF, ARE VIOLATIVE OF THE EQUAL PROTECTION OF THE LAWS.

Assuming arguendo that the strict scrutiny standard referenced hereinabove is inapplicable to the equal protection arguments to be employed in this case, it was still a violation of equal protection of the laws to dismiss the Plaintiffs' second through seventh claims for relief. Specifically, in *Tassian v. People*, 731 P.2d 672 (Colo. 1987), the Colorado Supreme Court held:

> Equal protection of the laws requires that the government treat similarly situated persons in a similar manner. A distinction between classes or groups of people, whether created by a statute or rule, must have some relevance to the purpose for which the classification is made. . . .

> In the absence of a suspect class, a fundamental right, or a classification triggering an intermediate standard of scrutiny, a rational basis standard of review is applicable. While equal protection of the laws does not demand that a statute or rule necessarily applies equally to all persons, it does require, under rational basis analysis, that a governmental classification which singles out a group of persons for disparate treatment be rationally founded on differences that are real and not illusory and that such classification be reasonably related to a legitimate state interest. . .

Id. at 675.

In the instant action, the disparate treatment asserted by the Defendants is in fact not real, but rather illusory. Further no legitimate state interest can be proffered. The only difference between the Plaintiffs in this case, and Plaintiffs who can unquestionably assert claims similar to those maintained by the Plaintiffs in this case, is the *insurer chosen*. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1273-1274 (Colo. 1985). Under these circumstances, no real distinction can therefor be maintained. Further, the Defendants participation in the insurance industry like any private insurer does not further the provision of essential services or performance of essential functions. Accordingly, to preclude the Plaintiffs from asserting their second through seven claims for relief would be to deprive them of the equal protection of the laws.

Specifically, individuals insured for worker's compensation purposes by an insurance company such as State Farm Insurance would be treated differently than those whom the CCIA provides the same coverage. In the case of an employee whose employer purchased workers'

compensation insurance coverage from a private insurer, the employee could, pursuant to the laws of the State of Colorado, assert and if proved, recover on a bad faith claim against said entity, while an employee of an employer who has purchased workers' compensation insurance coverage from the CCIA would not be able to assert a claim for bad faith for identical conduct, even though both entities are insurance companies. This fact is best underscored by the fact that the claim of bad faith/breach of fiduciary duty has been recognized relative to adjusters who are not responsible to pay any claim that is submitted. *Johnson v. Scott Wetzel Services. Inc.*, 797 P.2d 786 (Colo.App. 1990). As such, an independent adjustor, adjusting claims on behalf of the Defendants, could be found responsible and/or liable for bad faith conduct and be subject to satisfying such a judgment, while the Defendants would not, even though the independent adjustor and the Defendants may have both engaged in the exact same bad faith conduct. This circumstance was specifically recognized in *Jordan v. City of Aurora and GAB Business Services. Inc.*, 92 CA 1632 (Colo.App. 1993), a copy of which is attached hereto and incorporated herein by reference as Exhibit "A", in which this Court held:

> Here, GAB stood in the shoes of Aurora in processing plaintiff's claim, and we hold that the decision announced in *Savio* sufficiently foreshadowed a good faith duty imposed on insurance carriers as well as their agents. Thus, plaintiff should have been permitted to reassert her bad faith claim against GAB.

Id. at 11. This decision further overturned a jury verdict against Aurora as a self insured for worker's compensation purposes as a result of CGIA immunity for a bad faith claim.

Further, an individual who has been subjected to bad faith conduct by an insurance company, as recognized by the Colorado Supreme Court, is extremely vulnerable and suffers substantial damages in addition to the amounts recoverable under the insurance contract. As the purpose of the Courts is to make Plaintiffs whole who have suffered an injury at the hands of the Defendant, to provide immunity to the Defendants in this case, would be to say that employees who are subjected to bad faith conduct at the hands of the Defendants are not entitled to be made whole, while employees whose insurance is provided by a private company, such State Farm Insurance Company, would be entitled to be made whole. This is especially inequitable as, in most instances the employee has no control over which insurance company will provide workmen's compensation insurance. Such a determination is contrary to the equal protection provisions of the United States Constitution and the Colorado Constitution.

It should likewise be noted that while generally certain portions of the CGIA have been determined to be constitutional in light of the facts presented, the issues presented in this case are of first impression and no determination has been made that the CGIA is applicable to claims commenced against the Defendants. It should also be noted that application of the CGIA to the Defendants is contrary to Article V, § 25 of the Colorado Constitution. Specifically, Article V, § 25, in pertinent part, provides:

> The general assembly shall not pass local or special laws in any of the following enumerated cases, . . . granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatsoever. . . .

As the Defendants by statute are a corporation, and in reality are nothing more than an insurance company, to grant them

immunity as outlined in C.R.S. § 8-45-101 is violative of the Colorado Constitution and the United States Constitution. As such, the Plaintiffs' second through seventh claims for relief should be reinstated and allowed to proceed forward.

C. THE PLAINTIFFS HAVE PROPERLY ASSERTED A CLAIM PURSUANT TO 42 U.S.C. § 1983.

The Trial Court, in its Order dated September 27, 1993, on the propriety of Plaintiffs' 42 U.S.C. § 1983 claim held:

> 4. The plaintiffs' claim based upon 42 U.S.C. § 1983 is dismissed because the defendants are not 'persons' within the meaning of 42 U.S.C. § 1983. Here, the defendants are equivalent to the state. The defendants are not dependent entirely on the state for funds and resources to respond to a suit for damages-clearly and 'arm of the state.' *Wigger v. McKee*, 809 P.2d 999, (Colo. App. 1990). *Will v. Michigan Department Of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

As such, the issue to be determined in this case is whether or meaning of not the Defendants are "persons" within the meaning of 42 U.S. C. § 1983. In *Wigger v. McKee*, 809 P.2d 999, (Colo. App. 1990), this Court held:

> Hence *Will* excludes from § 1983 coverage only the 'states or governmental entities that are considered 'arms of the state' for eleventh amendment purposes.' *Will v. Michigan Department Of Social Services*, *supra*.
>
> Whether a governmental entity is an 'arm of the state' is determined by balancing the entity's

independent powers with those entirely dependent on the state. See *Mount Healthy City Board of Education v. Doyle*. 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

If the entity is the state's alter ego, dependent entirely on the state for the funds and resources to respond to a suit for damages, it is equivalent to the state. (Citations omitted.)

On the other hand, counties and municipal corporations that are defined as 'bodies corporate and politic' and have even limited power to sue and be sued in their own names are not the state for purposes of the eleventh amendment, even though they are political subdivisions of the state. See *Mount Healthy City Board Of Education v. Doyle*, *supra*; *Moor v. County of Alameda*, *supra*; *Mosier v. Robinson*, 722 F.Supp. 555 (W.D. Ark. 1989); See also *Will v. Department Of State Police*, *supra* (at time § 1983 was enacted, the term 'body politic' was most appropriately applied to a public corporation, which included, towns, cities and counties, but not states').

In Colorado, a county is defined as 'a body corporate and politic' and has the power to sue and be sued, to enter into contracts, and to level certain taxes. § 30-11-101, C.R.S. (1986 Repl. Vol. 12A). Therefore, it is not the alter ego of the state for eleventh amendment purposes and is a 'person' under 42 U.S.C. § 1983. . . . Such holdings involve neither the eleventh amendment nor 42 U.S.C. § 1983 and the United States Supreme Court has noted that it has 'consistently refused to construe the amendment to afford political

> protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power'.' *Lake County Estates. Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979).

Id. at 1003.

In applying the foregoing to the instant action, it is abundantly clear that the Defendants are "persons" within the meaning of 42 U.S.C. § 1983. Specifically, as cited hereinabove, C.R.S. § 8-45-101(1), in pertinent part provides:

> *There is hereby created the Colorado Compensation Insurance Authority which shall be a body corporate and a political subdivision of the state. The authority shall not be an agency of state government. nor shall it be subject to administrative direction by any state agency. . .*

This statutory statement indicates that although a political subdivision of the state, it is not subject to the authority or direction of state government. Further, the Defendants are not dependent upon the resources of the state in its operations, but rather does so based upon premiums collected such as any other private insurance carrier. Furthermore, the Defendants have the power to sue and be sued, and to enter into contracts, such as insurance policies. In determining the balance of independent powers with those entirely dependent upon the state, it is apparent that virtually none of the Defendants' powers are entirely dependent on the state. As such, the Defendants are "persons" within the meaning of 42 U.S.C. § 1983, and Plaintiffs' claim against

the Defendants for violation of 42 U.S.C. § 1983 should be reinstated against the Defendants.

VI.
CONCLUSION

For the reasons outlined hereinabove, including that the CGIA, as applied to the Defendants in this situation is unconstitutional, and that the Defendants are "persons" within the meaning of 42 U.S.C. § 1983, the Plaintiffs' claims should be reinstated, the Court's September 27, 1993 Order vacated, and a determination rendered that the CGIA is unconstitutional as applied under the facts of this specific case. Additionally, Plaintiffs request such other and further relief as is deemed just and proper.

DATED this 7th day of May, 1994.

Respectfully submitted,

ANDREW T. BRAKE, P. C.

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CERTIFICATE OF MAILING

I hereby certify that on this 9th day of May, 1994, true and correct copies of the above and foregoing **OPENING BRIEF OF PLAINTIFFS-APPELLANTS MARK SIMON, CHERYL SIMON, AND MALACHAI**

SIMON were placed in the United States mail, postage prepaid, addressed to the following:

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SIMON.APP/TTHD

APPENDIX C

COLORADO COURT OF APPEALS, STATE OF COLORADO

Case No. 93CA2211

REPLY BRIEF OF PLAINTIFFS-APPELLANTS MARK SIMON, CHERYL SIMON AND MALACHAI SIMON

MARK SIMON, CHERYL SIMON, and MALACHAI SIMON,

Plaintiffs-Appellants,

vs.

THE STATE COMPENSATION INSURANCE AUTHORITY, THE STATE COMPENSATION INSURANCE FUND, and THE COLORADO COMPENSATION INSURANCE AUTHORITY,

Defendants-Appellees.

Appeal from the Honorable Larry J. Naves
Denver County District Court, Courtroom 8
Civil Action No. 93-CV-1982

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COMES NOW the Plaintiffs-Appellants Mark Simon ("Mr. Simon"), Cheryl Simon, and Malachai Simon (hereinafter referred to collectively as "Plaintiffs"), by and through their attorneys of record, Andrew T. Brake, P.C., and for their reply brief states:

I.
INTRODUCTION

Defendants-Appellees The State Compensation Insurance Authority, The State Compensation Insurance Fund, and The Colorado Compensation Insurance Authority (hereinafter referred to as "Defendants") engage in a lengthy discussion of their position in which the applicable standards to be applied in this case are discussed, as well as the manner in which the Defendants operate. However, the assertions made by the Defendants are not supported, and appear to be an attempt to confuse the real issues in this case. The inescapable conclusion in this case is that the Plaintiffs' claims were improperly dismissed, and that the Colorado Governmental Immunity Act, C.R.S. § 24-10-101 *et seq.* (hereinafter referred to as "CGIA"), is unconstitutional as applied to the Defendants.

Specifically, the Defendants assert that rather than a strict scrutiny standard, a reasonableness standard must be applied in determining whether or not the CGIA is unconstitutional as applied to the Defendants. Further, the Defendants assert that any reasonable basis, whether actually considered or not, will support the constitutionality of the statute, and that because the Defendants are insurers of last resort, are to provide insurance at the lowest possible cost, and are subject to the provisions of the risk management fund for payment of judgments and/or defense costs, it is legitimate to believe that the legislature, for fiscal planning purposes, felt it

appropriate to limit the Defendants liability. This position is not supported by the reality of the situation.

With regard to Plaintiffs' equal protection argument, the Defendants maintain that tort recovery can be limited, and the fact that different people are treated differently does not render an act unconstitutional for purposes of equal protection.

Further, with regard to Plaintiffs' due process arguments, the Defendants maintain that a remedy can be limited, and as such, the dismissal of Plaintiffs' claims is not violative of due process guarantees. This position is likewise unsupported by the reality of this situation.

Finally, Defendants maintain that as the alter ego of the state, including that it is a state agency, that it is not a "person" within the meaning of 42 U.S.C. § 1983. However, the actual facts in this case clearly establish that in fact the Defendants are "persons" for purposes of 42 U.S.C. § 1983.

It should also be noted that several of Plaintiffs' arguments, as contained in Plaintiffs' Opening Brief were not addressed. As such, rather than reassert those arguments herein, Plaintiffs incorporate herein by reference those arguments.

II.
ARGUMENT

A. THE COLORADO GOVERNMENTAL IMMUNITY ACT. AS APPLIED TO PLAINTIFFS' SECOND THROUGH SEVENTH CLAIMS FOR RELIEF IS UNCONSTITUTIONAL

1. *THE STRICT SCRUTINY STANDARD IS APPLICABLE IN DETERMINING THE CONSTITUTIONALITY OF THE COLORADO GOVERNMENTAL IMMUNITY ACT AS APPLIED TO THE DEFENDANTS*

As outlined in Plaintiffs' Opening Brief, when a classification creates a suspect class, such as one which interferes with a fundamental right, a strict scrutiny standard is to be applied, i.e., the statutory classification must relate to a compelling governmental interest. *Tassian v. People*, 731 P.2d 672, 675 (Colo. 1987). It has further been recognized that a right to damage for an injury is property. *Rosane v. Senger*, 149 P.2d 372, 375 (Colo. 1944). See also *State v. DeFoor*, 824 P.2d 783 (Colo. 1992). Article II, § 6 of the Colorado Constitution provides:

> Courts of justice **shall** be open to **every person,** and a **speedy remedy afforded for every injury to person, property or character;** and right and justice should be administered without sale, denial or delay. (Emphasis added).

The foregoing clearly establishes that for all injuries to person, property of character a remedy shall be provided, along with access to the courts. It also establishes that a fundamental right is affected if access to the courts is denied, or if a remedy is not afforded for an injury to a person, property or character. In the instant action, such a denial has occurred, and as such, the Defendants must establish a compelling governmental interest.

As set forth hereinafter, no such compelling governmental interest exists. Further, as set forth hereinafter, even if the lower reasonableness standard were to be applied, it is clear that the CGIA, as applied to the Defendants is still unconstitutional.

2. *NO REASONABLE BASIS EXISTS TO SUPPORT A FINDING THAT THE COLORADO GOVERNMENTAL IMMUNITY ACT IS CONSTITUTIONAL AS APPLIED TO THE DEFENDANTS*

The Defendants, in support of its contention that a reasonable basis exists for its assertion that the CGIA is constitutional as applied to them maintains the following:

1. Defendants are insurers of last resort;

2. Defendants must provide insurance at the lowest possible premium;

3. Defendants are included in the State's Risk Management Fund, and claims and defense costs are paid from said fund. As such, fiscal planning and conservation of taxpayer monies is involved; and

4. Defendants cannot declare bankruptcy.

More specifically, the Defendants maintain that each of the foregoing may have been a reason why the legislature would legitimately want to include the Defendants in the CGIA. However, upon reviewing each of these items, it becomes abundantly clear that not only do these items not support the Defendants' contentions, but that the Defendant has misstated each of the items referenced.

First, with regard to its contention that Defendants are insurers of last resort. In the Defendants' own brief, it states that Defendant CCIA may reject an application for worker's compensation insurance. Further, the statutes provide for an employer to be self insured or to participate in a risk pool. As such, no protection is required on the basis that Defendants are insurers of last resort, as the legislature specifically addressed this issue by determining other methods of obtaining insurance. Further, pursuant to C.R.S. § 8-45-113, the Defendants can cancel a policy. In addition, as Defendants **do** decline insurance applications, the legislature would have no reason to provide protection on that basis.

Second, with regard to Defendants' assertion that it must provide insurance at the lowest possible premiums, C.R.S. § 8-45-106 provides:

> It is the duty of the board, in the exercise of the powers and discretion conferred upon it by articles 40 to 47 of this title, ultimately to fix and maintain, for each class or occupation, the lowest possible rates of premium **consistent with the maintenance of a solvent Colorado compensation insurance authority fund, and the creation and maintenance of a reasonable surplus after the payment of legitimate claims for injury and death, that may be authorized to be paid from the Colorado compensation insurance authority fund for the benefit of injured and dependents of killed employees.** (Emphasis added).

What is clearly evident from the foregoing is that in fact, the Defendants are not required to provide insurance at cost, but rather to provide the lowest premiums possible in light of their need to maintain reserves and remain solvent. This factor is the same as for any other insurance company, i.e., that they provide as low a premium as possible to remain competitive while ensuring that it can meet its obligations. As such, this factor does not provide a basis for providing the Defendants immunity, especially when the Defendants can avoid high risk clients just as a private insurance company would.

Third, with regard to its contention that inclusion in the risk management fund, and its contention that any claims would be paid out of such fund, these contentions are false. Specifically, C.R.S. § 8-45-101(1) provides:

> There is hereby created the Colorado compensation insurance authority which shall be a body corporate and a political subdivision of the state. The authority shall not be an agency of state government, nor shall it be subject to administrative direction by any state agency except as provided in this article, and except for purposes of the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S., and except for inclusion in the risk management fund and by the division of risk management as provided in part 15 of article 30 of title 24, C.R.S.

Pursuant to C.R.S. § 24-30-1502, the Defendants are considered a state agency for risk management fund purposes. C.R.S. § 24-30-1510(3) provides:

Expenditures shall be made out of the risk management fund in accordance with subsection (1) of this section only for the following purposes:

(a) To pay liability claims and expenses related thereto, brought against the **state**, its officials, or its employees pursuant to the "Colorado Governmental Immunity Act", article 10 of this title, and claims against the **state**, it officials, or its employees arising under federal law, which the state is legally obligated to pay and which are compromised or settled pursuant to section 24-30-1515 or in which a final money judgment against the state has been entered;

(b) To pay the administrative costs of operating the division and the costs of purchasing services pursuant to sections 24-30-1506, 24-30-1507, and 24-30-1513;

(c) To procure and pay premiums for one or more policies of insurance purchased pursuant to this part 15 to protect against all or any portion of the potential liabilities of the state of Colorado or of any **state agency** or its officers and employees;

(d) To pay any deductible or self-insured retention contained in any insurance policy purchased by or at the direction of the division;

> (e) To pay liability claims and expenses related thereto **when a state agency has contracted to defend and hold harmless the owner of property leased to the state agency for a state purpose if such contract limits the state's obligation to claims arising from alleged negligent acts or omissions of the state agency and of its public employees which occurred or are alleged to have occurred during the performance of their duties and within the scope of their employment, except where such acts or omissions are willful and wanton.** Such claims shall be subject to limitations of the "Colorado Governmental Immunity Act", article 10 of this title. No such contract shall be valid unless approved in writing by the state risk manager and meets the requirements of this paragraph (e). (Emphasis added).

Further, 24-30-1510(4) provides that the fund is not to be utilized for any claim not set forth in subsection (3) above. As such, it is clear that the payment of any claim, or the costs associated therewith cannot be obtained from the risk management fund, as such payments are limited to obligations of the state, not state agencies. Further, based upon the definition of state agency in this section, as well as its inclusion in a portion of subsection (3) above, if it were intended that they be included, they would have been so identified. As such, the legislature would have no reason to nor did they provide protection to the Defendants on the basis of fiscal planning, as any moneys due would have to be paid by the Defendants out of their own separate funds.

This belief is further supported by C.R.S. § 8-45-102 which provides that the Defendants have their own funds, control over their own funds, the general fund cannot obtain the funds, the basis for said funds is the premiums they collect, and that said funds are to be utilized in the payment of their obligations. Additionally, C.R.S. § 8-45-103 provides that the Defendants can sue or be sued relative to any matters associated with its operation. As such, it was not intended that the Defendants be included in the risk management fund relative to its operation, but rather that the Defendants would be a self-sufficient operation. Therefore, the Defendants' arguments concerning fiscal planning are erroneous.

Finally, with regard to its contention that the Defendants cannot go out of business or declare bankruptcy, it provides no support for this contention, and as such is without merit. What evidence does exist is that the Defendants have the ability to establish whatever premiums are necessary to remain solvent, they can decline to insure and/or cancel an entities insurance, they can sue or be sued, and they must pay their obligations, just like any other insurance company. This fact is confirmed by the Defendants negative cash situation a few years ago, while they now have a cash surplus. No state monies were utilized to rectify the Defendants' financial position, but rather increased premiums resulted in this turnaround. As such, no basis exists for its contention that the legislature may want to protect Defendants since they cannot declare bankruptcy.

B. ***DISMISSAL OF PLAINTIFFS' SECOND THROUGH SEVENTH CLAIMS FOR RELIEF IS VIOLATIVE OF THE EQUAL PROTECTION OF THE LAWS***

The Defendants assert that tort claimants recovery may be restricted, and that the fact that an act treats different people differently will not render a statute unconstitutional. However, the Defendants fail to address the Plaintiffs' contention that the treatment must be based upon differences which are real and not illusory. *Tassian v. People*, 731 P.2d 672 (Colo. 1987).

In this case, the Defendants do not, because they cannot, establish any real difference between the Plaintiffs in this case, and an individual who obtained worker's compensation insurance from State Farm Insurance Company. The fact of the matter is, the only difference is the "private" insurer chosen, which often times is not in the hands of the employee. It should also be noted that on this point, the Defendants did not refute the Plaintiffs arguments. As equal protection requires that this element be established, the CGIA in this circumstance is violative of Plaintiffs' constitutional rights. Further, as outlined hereinabove, no legitimate state interest will be furthered by the preclusion of Plaintiffs' claims.

Finally, it should be noted that contrary to the Defendants' assertions, Plaintiffs' remedy is not just being limited, it is being eliminated, and as such, the Defendants contentions relative to same are inapplicable. What is clearly evident, is that Plaintiffs' claims should be reinstated, as the CGIA in this case is violative of equal protection of the laws.

C. *DISMISSAL OF PLAINTIFFS' SECOND THROUGH SEVENTH CLAIM FOR RELIEF IS VIOLATIVE OF THE DUE PROCESS GUARANTEE*

As recognized in *State v. DeFoor*, 824 P.2d 783 (Colo. 1992) a person cannot be deprived of a property interest without due process of law, and no due process can occur unless that party has his day in court. In response, the Defendants argue that a remedy can be limited, and that that is all that is occurring in the instant action. This position is ludicrous.

The Plaintiffs' claims, in their entirety, were dismissed. As such, the Plaintiffs have no claim at all for the damages caused by the Defendants' actions. Furthermore, even if it were to be assumed that a remedy was being limited, in this case, the remedy is being eliminated. The elimination of a remedy is in fact an elimination of the right. For what good is a right to sue if no remedy is available upon enforcing such right. As such, the Defendants' contentions lack merit and should be disregarded.

D. *THE DEFENDANTS ARE PERSONS AS DEFINED BY 42 U.S.C. § 1983*

The Defendants assert that they are the alter ego of the state because they are entirely dependent upon the state for funds and resources to respond to a suit for damages. In fact, that is the only response to the Plaintiffs' contentions as contained in their Opening Brief. As such, the arguments contained therein are confessed. In any event, the Defendants' contentions lack all merit and should be disregarded.

Specifically, as outlined hereinabove, pursuant to statute, the Defendants are entirely self-sufficient for virtually all purposes. Further, with regard to funds to defend or otherwise respond to suits for damage, it is also absolutely clear that the Risk Management Fund may not

be utilized for such a purpose, nor may any judgments be paid out of such funds. Accordingly, the Defendants are not dependent upon the state for funds to respond to a suit for damages. Finally, pursuant to the express holding of this Court in *Wigger v. McKee*, 809 P.2d 999, 1003 (Colo.App. 1990), the Defendants are persons within the meaning of 42 U.S.C. § 1983. As such, the dismissal of Plaintiffs' claim on the grounds that the Defendants are not "persons" within the meaning of the statute is erroneous.

III.
CONCLUSION

For the reasons outlined hereinabove, Plaintiffs respectfully request that this Court reinstate the Plaintiffs' claims, declare the CGIA unconstitutional as applied to the Defendants, and grant them such other and further relief as is deemed just and proper.

DATED this 15th day of July, 1994.

Respectfully submitted,
ANDREW T. BRAKE, P. C.

By /s/ Lee T. Judd
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CERTIFICATE OF MAILING

I hereby certify that on this 15th day of July, 1994, true and correct copies of the above and foregoing **REPLY BRIEF OF PLAINTIFFS-APPELLANTS MARK SIMON, CHERYL SIMON, AND MALACHAI SIMON** were placed in the United States mail, postage prepaid, addressed to the following:

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Golden, Colorado 80402

/s/ Donna L. Swanson

SIMON. REP/LHD

APPENDIX D

No. 97-1302

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

STATE COMPENSATION INSURANCE AUTHORITY and COLORADO COMPENSATION INSURANCE AUTHORITY,
Petitioners,
vs.
MARK SIMON, CHERYL SIMON, and MALACHAI SIMON,
Respondents.

On Petition for Writ of Certiorari to
The Supreme Court of the State of Colorado

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Colo. Rev. Stat. § 8-40-301(5) and (6):

8-40-301. Scope of term "employee".

. . . .

(5) "Employee" excludes any person who is working as a driver under a lease agreement pursuant to section

40-11.5-102, C.R.S., with a common carrier or contract carrier.

(6) Any person working as a driver with a common carrier or contract carrier as described in this section shall be eligible for and shall be offered workers' compensation insurance coverage by the Colorado compensation insurance authority or similar coverage consistent with the requirements set forth in section 40-11.5-102 (5), C.R.S.

24-10-103. Definitions.

. . . .

(5) "Public entity" means the state, county, city and county, municipality, school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdi-

vision thereof organized pursuant to law and any separate entity created by intergovernmental contract or cooperation only between or among the state, county, city and county, municipality, school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdivision thereof.

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